In The

Supreme Court of the United States

77-1722

October Term, 1977

No.

LAWRENCE DALIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LOUIS A. RUPRECHT
Attorney for Petitioner
1180 Raymond Boulevard
Newark, New Jersey 07102
(201) 624-6112

964 LUTZ APPELLATE PRINTERS, INC.
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Lawrence Dalia, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 3, 1978.

OPINIONS BELOW

The Court of Appeals for the Third Circuit filed an opinion on May 3, 1978. That opinion and the opinion of the United States District Court for the District of New Jersey dated

January 11, 1977 appear in the appendix hereto. The trial court opinion is officially reported as *United States v. Dalia*, 426 F. Supp. 862.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 3, 1978. This petition for a writ of certiorari has been filed within thirty days of the entry of that judgment. The jurisdiction of the United States Supreme Court is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May Government agents commit an otherwise illegal breaking and entry in order to install, maintain and remove electronic listening devices when lawful authority to intercept oral communications has been granted pursuant to Title III[1] but when no authority to commit a breaking and entry has been sought or obtained and the supervising court has not been advised of the manner of the proposed entry or installation?

2. May a sentence imposed within the statutory limits be the subject of appellate review?

STATEMENT OF FACTS

The petitioner Lawrence Dalia was indicted for his alleged role in transporting, receiving and possessing stolen goods. He was found guilty on two counts of a five-count indictment and sentenced to serve two concurrent five-year terms. A co-defendant, Daniel Rizzo, who was alleged to have been a hijacker of the interstate shipment pleaded guilty prior to the commencement of the trial.

1. "Title III" refers to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et. seq.*

Prior to the indictment of Lawrence Dalia and Daniel Rizzo, five other persons had been indicted for their respective roles in the hijacking of the interstate shipment and their transporting, receiving and possessing the stolen goods. These five individuals all pleaded guilty and were sentenced before return of the indictment of petitioner Dalia.

Pursuant to a request by the United States Department of Justice on March 14, 1973, Judge Frederick B. Lacey granted authorization to intercept telephone communications from two telephones located at petitioner's place of business in Linden, New Jersey. The authorization for the wiretap extended for twenty days. Upon expiration of the initial order, the United States Department of Justice applied for a new order authorizing continued wire interception of the two business telephones of the petitioner. In addition, the application sought permission to intercept oral communications of petitioner Dalia occurring within his private business office. On April 5, 1973, Judge Lacey authorized interception of oral communciations taking place within the petitioner's office. No reference was made in the application or the order with respect to the manner in which the oral communications would be intercepted nor was the court informed that a break-in was contemplated (Tr1.9-21 to 1.10-16).

On the night of the issuance of the order and extending into the early morning hours of the next day three special agents of the Federal Bureau of Investigation broke into the office of petitioner Dalia. They received no instructions from the court or any attorneys from the Department of Justice with respect to their proposed activities while on the premises of the petitioner (Appellate Appendix, pp. 106, 112).[2] After searching the entire building for "safety" reasons (A107) the agents proceeded to install a listening device in the ceiling of the petitioner's office

2. Reference to the Appellate Appendix filed with petitioner's appellate brief is hereinafter referred to a "A".

(A110). This listening device enabled the agents to overhear and record all conversations taking place in the petitioner's office for twenty days. At the conclusion of that order a third application was made to Judge Lacey to continue the interception of telephone communications on the business phones and the interception of oral communciations in the petitioner's office. Again, no mention was made in the application or order with respect to the manner of interception of oral communications at the inception of this third twenty-day period. No informal advice was given to the court as to what had occurred when the device was installed nor was any informal advice about any contemplated break-in disclosed (A114).

Without any prior notification to the court, two agents re-entered petitioner's office on May 16, 1973 and removed the electronic equipment. On both occasions the break-in was accomplished by entering through a window during the late night or early morning hours. The agents were in the petitioner's premises for two or three hours on the first occasion (A111) and between one-half to an hour the second time (A112). No reports or records were made by the agents with respect to their entry nor was the court advised of what had occurred after the termination of the third order or after the second break-in (A106, 114; Tr1.9).

A timely motion to suppress the results of the electronic surveillance was made on several grounds. One basis was that the unauthorized breaking and entry was a violation of the Fourth Amendment of the United States Constitution. A second basis for suppression was a contention of the petitioner that the Government had greatly exaggerated the number of incriminatory conversations being overheard in the five day Progress Reports submitted to the supervising judge in order to justify continuation of the eavesdropping and wiretapping. The recorded office conversations and intercepted telephone conversations resulted in tape recording more than 1,500 hours of reels. Over 5,000 telephone conversations were recorded and

more than 1,150 separately designated conversations were overheard and recorded from petitioner's private office.

Although the motion to suppress was made prior to trial, an evidentiary hearing was not entertained until the conclusion of the trial. It resulted in an opinion of the court dated January 11, 1977 denying the motion. The court then sentenced petitioner to a maximum five-year term sentence on each of the two counts upon which he was convicted; the term sentences to run concurrently. The petitioner had no prior criminal record. Of the six individuals who had previously been charged with offenses arising out of the criminal transaction for which petitioner was convicted, only the petitioner Dalia and another named Joseph Higgins played no role in the actual hijacking. With respect to Higgins, he was alleged to have stored the stolen goods on his property after the hijacking. The petitioner Dalia's role allegedly was to refer other convicted defendants to Joseph Higgins in return for which Higgins presumably would have forwarded a sum of money to petitioner. Upon sentencing Joseph Higgins for his role in the criminal transaction, Judge Lacey had imposed a three-year probationary sentence. As noted, Judge Lacey imposed a five-year term sentence upon petitioner Dalia. Only Dalia had chosen to contest the charges.

The United States Court of Appeals for the Third Circuit affirmed the conviction and sentencing of petitioner Dalia in an opinion filed May 3, 1978. No discussion was given to petitioner's argument that the sentence imposed was an abuse of discretion remediable upon appeal other than to recognize that the point had been raised. The opinion of the Court of Appeals dealt primarily with petitioner's contention that a breaking and entry to install a listening device without first obtaining judicial approval is a violation of the Fourth Amendment. After acknowledging the fact that other circuits agreed with petitioner's contentions, the Court of Appeals stated:

> "We accept Judge Lacey's finding that a surreptitious entry was the most effective means for installing the interception device as well as his finding that the installation was based upon probable cause and executed in a reasonable fashion.[3]

However, the Court of Appeals was not willing to reject unequivocally petitioner's contention. The Court of Appeals added:

> "In rejecting appellant's contention in this case that separate authorization was required for the forcible surreptitious entry, we do not adopt a rule that specific authorization is never required. In the future, the more prudent or preferable approach for Government agents would be to include a statement regarding the need of a surreptitious entry in a request for the interception of oral communications when a break-in is contemplated. This burden is minimal in light of the Fourth Amendment considerations that could be later raised."

In a footnote, the Court of Appeals seemed to invite the United States Supreme Court to clarify the issue with the following observation:

> "When the request to intercept oral communications was made in 1973 in the instant case, the Department of Justice was not on notice

3. A review of the trial judge's opinion indicates the court made no finding prior to the break-in that the particular installation was based upon a showing of probable cause or that the installation was performed in a reasonable fashion. Any such "finding" was made almost four years after the break-in. No evidence was ever produced on the motion to suppress to give factual support to the conclusion that the intrusion was the only feasible manner of accomplishing the eavesdropping.

> of any conflict among the Circuits. Since that time, absent a Supreme Court decision, there has developed an irreconcilable conflict among the various Courts of Appeals."

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals for the Third Circuit is in direct conflict with holdings of the courts of appeals for two circuits which have required prior authorization for a surreptitious forced entry to install or remove electronic eavesdropping devices.

The Court of Appeals for the Third Circuit in deciding the case at bar conceded that on the issue presented, "there has developed an irreconcilable conflict among the various courts of appeals." Within the last two years, the issue of surreptitious entries to effectuate electronic eavesdropping has been the subject of a decision by five courts of appeals. In two circuits, the District of Columbia and the Fourth Circuit, the petitioner's motion to suppress most certainly would have been granted and affirmed on appeal. In two other circuits, the Second and now the Third, the courts of appeals have held that prior court authorization to break and enter to install electronic listening devices need not exist once a valid authorization to intercept oral communications has been granted. It is probable that the Court of Appeals for the Eighth Circuit would require prior authorization before allowing a break and entry to install a listening device.

In *United States v. Ford,* 553 F. 2d 146 (D.C. Cir. 1977), the court was faced with electronic eavesdropping which had been accomplished by installing a listening device by way of a ruse. Pretending to evacuate a building because of a bomb threat, Government agents used the time to install electronic

listening devices. They had previously discussed the matter with the court supervising the Title III application. The court had specifically permitted the Government agents to

> "Enter and re-enter . . . for the purpose of installing, maintaining and removing the electronic eavesdropping devices. Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry or entry and re-entry by ruse and stratagem." *United States v. Ford,* 553 F. 2d 146, 149 (D.C. Cir. 1977).

Both the District Judge as well as the Court of Appeals held that this authorization was constitutionally overbroad. The District Court Judge in *Ford* held that the warrant gave the police "virtually unrestrained discretion in installing a surreptitious listening device." *United States v. Ford,* 414 F. Supp. 879 (D.D.C. 1976). The Court of Appeals fully concurred with the District Court's analysis, *United States v. Ford, supra,* at pp. 154-55, 165-70, and held that a break-in must be subjected to independent Fourth Amendment scrutiny by a neutral and detached magistrate upon oath or affirmation. The Court of Appeals in *Ford* held that, "When police seek to invade, surreptitiously and without consent, a protected premises to install, maintain, or remove electronic surrveillance devices, prior judicial authorization in the form of a valid warrant authorizing that invasion must be obtained." 553 F. 2d at 165.

In *Application of the United States,* 563 F. 2d 637 (4 Cir. 1977), the Government had sought a specific authorization to make surreptitious entry into the premises of gambling suspects. The District Judge denied the order holding that while sufficient cause existed to satisfy the Title III requirements for permission to electronically eavesdrop, an insufficient showing was made to justify a forcible surreptitious entry.

Upon the Government's appeal to the Court of Appeals, it was held:

> "The District Court was thus correct insofar as it subjected the request for authorization of surreptitious entry to separate Fourth Amendment consideration. Since in the absence of exigent circumstances, the Fourth Amendment commands compliance with the warrant requirement, we would normally countenance secret entry by federal agents for the purpose of installing, maintaining, or removing listening devices only under the following conditions: (1) where, as here, the District Judge to whom the interception application is made is apprised of the planned entry; (2) the judge finds, as he did here, that the use of the device and the surreptitious entry incident to its installation and use provide the only effective means available to the Government to conduct its investigation; and (3) only where the judge specifically sanctions such an entry in a manner that does not offend the substantive commands of the Fourth Amendment." 563 F. 2d at 643-44.

In *United States v. Agrusa,* 541 F. 2d 690 (8 Cir. 1976), *cert. denied,* 429 U.S. 1045 (1977), the court upheld a surreptitious entry because the order specifically authorized the break-in. The majority in *Agrusa* acknowledged the holding might be different if the supervising judge did not specifically authorize the break-in. 541 F. 2d 696, fn. 13. The court limited its decision by the following language:

> "We hold that law enforcement officials may, pursuant to express court authorization to do so, forcibly . . . enter business premises. . . .

* * *

> We express no view on the result which obtains when one or more of these factual variants is altered."

The other side of the issue presented in this petition is found in *United States v. Scafidi,* 564 F. 2d 633 (2 Cir. 1977), *cert. denied, sub. nom. Vigorito v. United States,* 46 L.W. 3704 (May 15, 1978). There, the court held that an order authorizing electronic surveillance carries,

> "its own authority to make such reasonable entry as may be necessary to effect the 'seizure' of the conversation.
>
> * * *
>
> We, therefore, hold that when an order has been made upon adequate proof as to the probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required." 564 F. 2d at 640.

The Court of Appeals for the Third Circuit in deciding the case at bar, grounded its decision upon the holding of *United States v. Scafidi, supra.* While recognizing the "irreconcilable conflict among the various courts of appeals" the Third Circuit did not give any reasoning why it favored the *Scafidi* rule over the rule set out in *Ford* and *Application of the United States.* Compounding the difficulties in attempting to find consistency in the circuits, the Eighth Circuit was asked to rehear *United States v. Agrusa, supra, en banc.* 541 F. 2d 704. The court was evenly divided and the petition for rehearing was consequently denied. However, the four dissenters in the Eighth Circuit indicated they had "grave doubts" that *any* judicial order authorizing a break and entry would be valid.

In addition to the foregoing cases, a District Court within the Sixth Circuit, in *United States v. Finazzo,* 429 F. Supp. 803 (E.D. Mich. 1977) has adopted the *Ford* rationale and required independent authorization for forcible entries to carry out an otherwise lawful oral interception order.

There can be no denial that a serious and irreconcilable conflict now exists among the circuits with respect to an important and sensitive area pertaining to Title III. There can be no question but that had petitioner been tried in the District of Columbia, the Fourth Circuit and probably the Eighth Circuit, the evidence would have been suppressed. It is unjust to litigants to permit incriminatory evidence to be admissible solely upon the fortuitous circumstance of venue. The issue presented is of great public interest and of enormous importance to petitioner and to the proper administration of Title III.

In opposing *certiorari* recently in *United States v. Scafidi, supra,* the Government represented that the problem presented may not be a recurring one inasmuch as the Department of Justice has recently instructed its supervising attorneys to seek explicit judicial approval for each contemplated break-in. Presumably, the Government will again seek to oppose *certiorari* on the same grounds. Anticipating such an argument, petitioner suggests that such a policy change is an inappropriate basis for denial of *certiorari.* First, it does not answer at all the argument that this petitioner has been subjected to an injustice. Second, it seems to concede the correctness of petitioner's position that such authorization must be obtained. The argument would be more seemly if coupled with a confession of error. Third, petitioner contends that prior judicial authorization for a break-in is a constitutional command; not simply an administrative matter which may subsequently be withdrawn or amended by administrative directive. Fourth, the number of similar cases in litigation at various stages may well far exceed the handful of reported opinions that have appeared to date. Fifth, irrespective of the position of the Department of Justice, this issue will

surely find its way into the federal system through state prosecutions since the impermissibility of an unauthorized break-in (assuming it is impermissible) is a violation of the Fourth Amendment.

Unlike *United States v. Scafidi, supra,* which has been so recently the subject of a denial of *certiorari,* this case presents the issue in a more straightforward manner. Here, there is but one aggrieved party with no issue as to standing. *Scafidi* involved numerous parties, only one of whom had any arguable standing to raise the issue of an illegal breaking and entry to install a listening device. Furthermore, the case at bar, unlike any of the other reported decisions, involves a situation where it is admitted the Government agents made no effort to apprise the supervising court, even informally, of their intention to commit a break and entry.

It is submitted that this case is the proper vehicle for resolution of an important issue which is ripe for decision.

II.

The decision below raises an important issue with respect to the supervisory powers of the courts in administering Title III and a question of first impression regarding statutory interpretation of an important aspect of Title III.

Title III imposes upon the courts a substantial responsibility in carrying out the congressional mandate. The proper role of a supervising judge is in doubt due to the conflict among the circuits. The court below, adopting the rationale of *United States v. Scafidi, supra,* was of the view that the statutory permission to eavesdrop electronically upon oral communications implied congressional approbation of break-ins without prior judicial approval. This reasoning is fallacious. Intercepting oral communications does not necessarily imply a

surreptitious entry. Modern technology permits the aural acquisition of conversations from great distances without necessitating physical intrusions in every case.[4]

The obious deficiencies and dangers in the procedure adopted by the Government need only be alluded to in passing. In the case at bar, as noted, the Government made no attempt to advise the court that a break-in was contemplated. The agents received no instructions from anyone with respect to how they were to conduct themselves on the premises. After they broke into petitioner's premises, they filed no report and made no record of their activities. No judge evaluated the need for a break-in. Alternative avenues entailing less intrusive methods were never discussed; *e.g.,* installation by way of a ruse or use of an informant or decoy. No affidavits or testimony were submitted to support the Government's desire to conduct a break and entry. No order was ever issued limiting the number of times the agents could enter, the number of agents to be on the premises, the amount of time the agents would be permitted to search the premises for "safety" reasons, the rights and duties of the agents while on the premises, the right to make subsequent entries to re-position, repair, maintain or remove the equipment, the right of the agents to be armed, the duty to advise local police of the break-in, the duty of Government attorneys to supervise the agents, or consideration of whether the premises would likely be vacant thereby lessening the chance of an unfortunate incident.

While it may be argued that it is not within the expertise of a federal judge to pass upon the methods selected by Government agents in carrying out their plans to electronically eavesdrop upon oral communications, the language of this Court in a slightly different setting is most appropriate:

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4. See *Lopez v. United States,* 373 U.S. 427, 468, fn. 16 (Brennan, J., dissenting). See also *Silverman v. United States,* 365 U.S. 505, 508-09.

"We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly, courts can recognize that domestic security surveillance involves different considerations from the surveillance of 'ordinary crime.' If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance." *United States v. United States District Court,* 407 U.S. 297, 320.

Title III is silent as to obligations of the Government in securing an authorization to eavesdrop on oral communications where a break-in is contemplated or deemed necessary. Irrespective of the constitutional requirements, the courts in *Agrusa, Scafidi* (concurring opinion of Judge Gurfein) and even the court below all suggested that, in making Title III applications, the Government should apprise the supervising judge of the necessity to break in and the court should take it upon itself to make a decision whether to permit such an entry. But no guidance has been given to the courts as to what it is the district judge should do, other than say yes or no. It is essential that if such a duty is imposed upon the supervising court, either implicitly by Title III itself or by an independent supervisory duty, then the parameters of such supervision must be set out. The failure of this Court to set out specific guidelines will only result in jeopardizing future prosecutions. Even under the new Department of Justice guideline in which the court is to be apprised of the Government's intentions, there will be litigation dealing with the proper exercise of supervision by the court unless the issue is clarified by the Court in this case.

III.

The decision below raises an important question of first impression regarding the role of an appellate court in reviewing the alleged excessiveness of a sentence.

The petitioner was sentenced to two concurrent five-year terms of imprisonment. He had no prior criminal record. Of the seven individuals indicted as a result of the criminal transaction, only one other defendant had as limited a participation as petitioner and that individual was the person who actually stored the stolen goods. The only real distinction between petitioner and that other individual was that petitioner failed to plead guilty. He was tried and convicted on two of the five counts.

The apparent disparity in sentences should be grounds for some judicial review and explanation, if justified. When raised on appeal, the Government answered the contention with the following complete argument:

> "Appellant contests as excessive the sentence imposed on him for the crimes which the jury found he committed.
>
> That sentence being within the statutory limitation, it may not be reviewed by this court."

The court below dealt with the issue in a footnote, as follows:

> "Appellant also maintains . . . that the trial court abused its discretion in sentencing Dalia to two five-year concurrent terms. We find no merit to these contentions."

There is no clear directive to the courts of appeals with respect to the scope of appeal of an allegedly excessive sentence. Certain recent cases have intimated that a remedy for an excessive sentence will lie if it rises to the level of "an abuse of discretion". *Woosley v. United States,* 478 F. 2d 139 (8 Cir. 1973); *United States v. Robin,* 545 F. 2d 775 (2 Cir. 1976). The Government in the case below took the position that any sentence within a statutory limit is not reviewable, citing *United States v. Lee,* 532 F. 2d 911 (3 Cir.), *cert. denied,* 429 U.S. 838 (1976) and *Government of the Virgin Islands v. Venzen,* 424 F. 2d 521 (3 Cir. 1970).

An issue of such significance to the public, to criminal defendants and to the administration of justice should be the subject of a definitive ruling by this Court.

CONCLUSION

For the foregoing reasons set forth above, it is submitted a writ of certiorari to the United States Court of Appeals for the Third Circuit should be issued.

Respectfully submitted,

s/ Louis A. Ruprecht
Attorney for Petitioner

APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 3, 1978

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-1277

UNITED STATES OF AMERICA,

Appellee

vs.

LAWRENCE DALIA,

Appellant

On Appeal From the United States District Court for the District of New Jersey
(D.C. Crim. No. 75-488-1)

Argued January 5, 1978

Before: ROSENN and HIGGINBOTHAM, *Circuit Judges,* and VanARTSDALEN, *District Judge**

Jonathan L. Goldstein,
United States Attorney
Maryanne T. Desmond,
Assistant U.S. Attorney

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* Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Decision of the United States Court of Appeals for the Third Circuit Dated May 3, 1978

Federal Building
Newark, New Jersey 07102
Attorneys for Appellee

Louis Ruprecht
Ruprecht & Graham
1180 Raymond Boulevard
Newark, New Jersey 07102
Attorney for Appellant

OPINION OF THE COURT

(Filed May 3, 1978)

Higginbotham, *Circuit Judge*

The crucial issue before this Court in this appeal from a final judgment of conviction stems from the use of electronic surveillance to obtain evidence of Lawrence Dalia's complicity in the crimes of which he was found guilty. Dalia was found guilty under two counts of a five-count indictment for conspiracy to transport, receive and possess stolen goods in violation of 18 U.S.C. §371 (1970) and for receiving stolen goods while in interstate commerce in violation of 18 U.S.C. §§2, 2315 (1970). Dalia's co-defendant, Daniel Rizzo, pleaded guilty to the offenses charged in the indictment prior to the commencement of the trial. Five named co-conspirators were charged in a prior indictment and pleaded guilty to the charge of possessing goods stolen in interstate commerce in violation of 18 U.S.C. §659 (1970). These five individuals were arrested on April 5, 1973, by FBI agents who, in the execution of a search warrant, found the stolen 664 rolls of polyester fabric valued at approximately $250,000. These rolls of fabric were the same goods underlying the offenses for which the appellant, Dalia, was convicted. Dalia was sentenced to serve two concurrent five-year terms.

Decision of the United States Court of Appeals for the Third Circuit Dated May 3, 1978

I.

On March 14, 1973, Judge Frederick B. Lacey granted the United States Department of Justice authorization to intercept wire communications emanating from two telephones located in Dalia's business office pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et seq.* The original order authorized wire interception for a period of twenty days. Upon the expiration of that order a new order was issued authorizing the interception of both wire *and* oral communications. The second order, issued April 5, 1973, provided that the Special Agents of the FBI were authorized to:

> Intercept oral communications of Larry Dalia, and others as yet unknown, concerning the above-described offenses at the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, and situated in the north westernly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey.

By an order dated April 27, 1973, the authorization to intercept oral and wire communications was extended for a maximum of twenty days. Pursuant to these orders, two business phones used by Dalia were electronically surveilled and a hidden microphone was installed in his place of business. Each interception order directed the Department of Justice to provide the court with progress reports on the fifth, tenth and fifteenth days of surveillance. Finally, on May 16, 1973, the interception of wire and oral communications terminated.

Decision of the United States Court of Appeals for the Third Circuit Dated May 3, 1978

Appellant's major contention on appeal to this Court pursuant to 28 U.S.C. §1291 is that an electronic listening device was unlawfully installed on his business premises by government agents after gaining entrance by surreptitious entry not explicitly authorized in the court's orders. Therefore, appellant argues, the trial judge erroneously denied his motion to suppress tapes obtained from the oral interception.[1] We agree with Judge Lacey that an order authorizing the interception of oral communications does not require explicit authorization for a forcible, surreptitious entry and we affirm.

II.

Appellant argues that the fourth amendment prohibits use of evidence obtained from an electronic listening device which agents installed in his premises after forcible and surreptitious entry without express judicial approval for such entry. In essence, the appellant contends that while the surveillance itself may be legally authorized by a search warrant, the legality of the break-in is entitled to separate fourth amendment scrutiny. Judge Lacey held that such explicit judicial approval of a break-in was not required when the surveillance was properly authorized.

---

1. Appellant also maintains that the supervising judge was misled by the government's progress reports and that the continuing electronic surveillance was unjustifiable, not so minimized as claimed by the government, and, presumably, lacking in probable cause. Appellant argues that the trial court erred in failing to interrogate a juror to determine whether the verdict was "tainted" by extraneous influences, that the disclosure of a privileged communication between Dalia and his wife to a grand jury that did not issue his indictment justifies the suppression of all electronically intercepted evidence and, finally, that the trial court abused its discretion in sentencing Dalia to two five-year concurrent terms. We find no merit to these contentions.

Decision of the United States Court of Appeals for the Third Circuit Dated May 3, 1978

Since Judge Lacey filed his opinion, the Fourth, Second and D.C. Circuits have rendered decisions on the issue involved in this case. In *Application of United States for an Order Authorizing the Interception of Oral Communications,* 563 F.2d 637 (4th Cir. 1977), the court held that government agents could covertly enter private premises to install a listening device only after the district court had made an independent determination to allow such covert entry. 563 F.2d at 644. Similarly in *United States v. Ford,*[2] 553 F.2d 146 (D.C. Cir. 1977), in an opinion *per* Judge Skelly Wright, the court held that the Fourth Amendment required that government agents seek a valid warrant specifically authorizing surreptitious entry to install electronic surveillance devices. In *Ford, supra,* the court's order authorized surreptitious entry; however, the order was found invalid on its face because of overbreadth. 553 F.2d at 165. To the contrary, in *United States v. Scafidi,* 564 F.2d 633 (2d Cir. 1977), the Second Circuit held that implicit in a court order authorizing the interception of oral communications was the concomitant authorization to secretly enter the premises to install the electronic surveillance device.

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2. *United States v. Finazzo,* 429 F. Supp. 803 (E.D. Mich. 1977), held that independent court authorization was required for covert entry to carry out an oral interception order. That court, in an opinion *per* now Circuit Judge Damon Keith, followed the analysis of *United States v. Ford, supra,* and the "reservations expressed by the Court of Appeals for the Eighth Circuit" in *United States v. Agrusa,* 541 F.2d 690 (8th Cir. 1976). In *Agrusa, supra,* the interception order contained express court authorization to break and enter. The court noted at 541 F.2d at 696 n. 13:

> We do not decide what result obtains if the officers act without express court authorization to break and enter (although with court authorization to intercept). We are certain, however, that the resolution becomes much more difficult in that event, and we commend the procedures employed here to law enforcement officials in the future.

Decision of the United States Court of Appeals for the Third Circuit Dated May 3, 1978

> [A]ny order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.
>
> . . .
>
> We, therefore, hold that when an order has been made upon adequate proof as to the probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required. 564 F.2d at 640.

Judge Lacey found that in this case a surreptitious entry was within contemplation.

> On this set of facts, I find that the safest and most successful method of accomplishing the installation of the wiretapping device was through breaking and entering the premises in question. Dalia in fact stated that, to the best of his knowledge, it would be impossible to install such a device in that location without gaining access to the building forcibly. Affidavit of Dalia at ¶4. In most cases the only form of installing such devices is through breaking and entering. The nature of the act is such that entry must be surreptitious and must not arouse suspicion, and

Decision of the United States Court of Appeals for the Third Circuit Dated May 3, 1978

> the installation must be done without the knowledge of the residents or occupants.[3]

426 F. Supp. 862, 866 (1977).

We accept Judge Lacey's finding that a surreptitious entry was the most effective means for installing the interception device as well as his finding that the installation was based upon probable cause and executed in a reasonable fashion.

In rejecting appellant's contention in this case that separate authorization was required for the forcible surreptitious entry, we do not adopt a rule that specific authorization is never required. In the future, the more prudent or preferable approach for government agents would be to include a statement regarding the need of a surreptitious entry in a request for the interception of oral communications when a break-in is contemplated.[4] This burden is minimal in light of the fourth amendment considerations that could be later raised.

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3. When Dalia's counsel argued before the commencement of trial the need for greater court supervision in the covert installation of interception devices, Judge Lacey clarified, for the record, his involvement in the follow-up of his order. He stated that: (1) he did not discuss with the supervising attorney or the agents how the order would be carried out and gave no limiting instructions on this matter and (2) he did not discuss afterwards how the order was carried out or how entry was made. Consequently, we cannot affirmatively state that the record demonstrates that Judge Lacey was actually aware of the surreptitious entry; however, his opinion shows that he was cognizant that such surreptitious entry might be most appropriate.

4. When the request to intercept oral communications was made in 1973 in the instant case the Department of Justice was not on notice of any conflict among the circuits. Since that time, absent a Supreme Court decision, there has developed an irreconcilable conflict among the various courts of appeals.

Decision of the United States Court of Appeals for the Third Circuit Dated May 3, 1978

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

s/ A. Leon Higginbotham
Circuit Judge

JUDGMENT DATED MAY 3, 1978

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 77-1277

UNITED STATES OF AMERICA

vs.

DALIA, LAWRENCE,

Appellant

(D.C. Criminal No. 75-488-1)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE —— DISTRICT OF NEW JERSEY

Present: ROSENN and HIGGINBOTHAM, *Circuit Judges* and VANARTSDALEN, *District Judge**

* Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Judgment Dated May 3, 1978

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the —— District of New Jersey and was argued by counsel on January 5, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 27, 1977, be, and the same is hereby affirmed.

ATTEST:

s/ Thomas (illegible)
Clerk

May 3, 1978

PORTION OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JANUARY 11, 1977 RELATING TO SURREPTITIOUS ENTRY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal #75-488

UNITED STATES OF AMERICA,

Plaintiff

v.

LAWRENCE DALIA,

Defendant.

OPINION

By LACEY, J.

By an application dated March 14, 1973 the United States Department of Justice requested and received authorization to intercept telephonic conversations emanating from two telephones located on the business premises of defendant Lawrence Dalia.* On April 5, 1973 the Justice Department sought and received an extension of their authority to intercept wire communications of Dalia and others, and, on the same date, authority was acquired to commence oral interception at Dalia's office. Subsequently, on April 27, 1973 the final request for an extension of its eavesdropping authority was approved by the court. As a result of these orders, wire interception devices

* The application and authorization were made pursuant to 18 U.S.C. §2516.

Portion of Decision of the United States District Court for the District of New Jersey dated January 11, 1977 Relating to Surreptitious Entry

were installed and did operate from March 15 to May 16, 1973, and an oral interception device was similarly installed and did operate between April 5 and May 16, 1973. The objective sought to be obtained by these interceptions was a determination of the scope of and participants in an alleged conspiracy involving theft from interstate shipments and interference with commerce.

An indictment charged this defendant with conspiracy and substantive crimes (18 U.S.C. §§371 and 2315) related to the theft and possession of an interstate shipment of textiles on or about April 3, 1973. On June 18, 1976 a jury verdict of guilty was returned.

In presenting its case against defendant Dalia, the government used the results of the aforementioned electronic surveillance. Defendant objected and moved to suppress the results of all illegal electronic surveillance and for an evidentiary hearing regarding the manner in which those oral and wire interceptions were accomplished. A post-trial evidentiary hearing was held on July 29, 1976.

In support of his motion, Dalia contends that those agents installing the device to intercept oral communications did unlawfully break and enter and trespass upon the premises of defendant, and by so doing did render any evidence obtained from that illegal entry inadmissible.

The bases for that contention are (1) that the government was required to seek judicial approval of an otherwise illegal breaking and entering for the purpose of installing an electronic eavesdropping device; (2) that such approval was neither sought nor obtained; and (3) that the use of evidence obtained from the oral interception device is contrary to the fourth amendment protection against unreasonable searches and seizures.

Portion of Decision of the United States District Court for the District of New Jersey dated January 11, 1977 Relating to Surreptitious Entry

Defendant's second contention is that the progress reports submitted by the government for extensions of time for the wire surveillance were falsified and if the court had known, no extensions would have been allowed. His final contention is that the tapes should be suppressed because the government failed to adhere to minimization requirements.

Defendant preliminarily argues that the statements of the government, as well as its special agent, that normal investigative procedures reasonably appeared unlikely to succeed if tried, failed to satisfy the "full and complete statement" requirements of 18 U.S.C. §2518(1)(c). The supporting affidavits submitted on April 5 and April 26, 1973, allegedly fell short of the elements enunciated by this court in *United States v. Falcone*, 364 F. Supp. 877, 889 (D.N.J. 1973), *aff'd*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975), in that the "applications for extensions offer very little toward a finding of the anticipated failure of standard methods of investigation." Defendant's Brief at 10. According to defendant, the government's sources could have verified the degree of involvement of defendant's co-conspirators and wiretapping was unnecessary. Additionally, it is argued, the agents, through wiretapping conversations pursuant to the original order, should have been able to pinpoint the locations or drops where stolen goods were stored so that continued eavesdropping was unnecessary.

In an application for a court-ordered electronic surveillance under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, *et seq.*, the government must present the court with

Portion of Decision of the United States District Court for the District of New Jersey dated January 11, 1977 Relating to Surreptitious Entry

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .

18 U.S.C. §2518(1)(c). The court may then authorize the interception if it determines that

> normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous . . . .

18 U.S.C. §2518(3)(c). The statutory burden on the government is not great in showing compliance with §2518(3)(c) and the government "need not prove to a certainty that normal investigative techniques will not succeed, but rather need only show that such techniques 'reasonably appear to be unlikely to succeed if tried.' " *United States v. Armocida*, 515 F.2d 29, 38 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975).

Sections 2518(1)(c) and (3)(c) must be read in a common sense fashion. S. Rep. No. 1097, 90th Con., 2d Sess., 1968 U.S. Code Cong. & Admin. News at 2112, 2190. *See also United States v. Armocida, supra.* They are designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. *United States v. Kahn*, 415 U.S. 143, 153 n. 12 (1974); *United States v. Robertson*, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975). Their purpose "is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to

inform the issuing judge of the difficulties involved in the use of conventional techniques." *United States v. Pacheco,* 489 F.2d 554, 565 (5th Cir. 1974), *cert. denied,* 421 U.S. 909 (1975).

I am in agreement with the Second Circuit in *United States v. Steinberg,* 525 F.2d 1126 (1975), *cert. denied,* 44 U.S.L.W. 3659 (U.S. May 18, 1976) that "[w]hen one endeavors to prove a negative, it is difficult to be very specific about it" and I am "loathe to set impossibly burdensome standards." *Id.* at 1130. *See also United States v. Falcone, supra,* 364 F. Supp. at 888-89; *United States v. Staino,* 358 F. Supp. 852, 856-57 (E.D. Pa. 1973). I am staisfied that the government has substantially complied with the statutory mandate.

The three probable cause affidavits that Special Agent Hokenstad submitted to me were facially sufficient for me to make a determination that alternative investigative measures had either been tried and failed, *see United States v. Robertson, supra,* reasonably appeared unlikely to succeed if tried, *see United States v. Armocida, supra,* 515 F.2d at 38, or were too dangerous to be used. *Id.* Defendant's allegations as to pinpointing locations and the use of sources are not supported by affidavit or any other materials and are mere speculation.

Defendant next contends that an applicant for an interception order is expected to request the approval of the court to break and enter in order to install the electronic device. The court, it is asserted, did not therefore pass upon the question of whether the authorized surveillance could be accomplished in some lesser manner.

In support of this argument, defendant relies upon the holding in *United States v. Ford,* 414 F. Supp. 879 (D.D.C.

1976). In that case the ruse of two bomb scares at defendant's premises was used to gain entry by the government. The warrant had stated that "entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse and stratagem." *Id.* at 881-82. The court found the warrant to be invalid. It held that the issuing judge had a necessary role, under 18 U.S.C. §2518(4), in determining the manner of entry and that this role had been wrongfully and without direction assigned to the executing officers. The warrant was found to be facially overbroad and illegal. *Id.* at 884-85.

Defendant also relies upon the dicta of the court in *United States v. Agrusa,* No. 76-1036 (8th Cir. 1976), where the court approved interception of wire and oral communications conducted by means of a forcible and surreptitious entry because there was prior judicial direction to the officers to break and enter. The court stated, however, that:

> we do not decide what result obtains if the officers act without express court authorization to break and enter (although with court authorization to intercept). We are certain, however, that the resolution becomes much more difficult in that event, and we commend the procedures employed here to law enforcement officials in the future.

Id. Slip Opinion at 11 n. 13.

Neither 18 U.S.C. §2518(4), which specifies the necessary contents of a Title III authorization order, nor Rule 41(c) of the Federal Rules of Criminal Procedure, which indicates that a

Portion of Decision of the United States District Court for the District of New Jersey dated January 11, 1977 Relating to Surreptitious Entry

warrant must identify the property, and name or describe the person or place to be searched, requires the court to direct the manner of entry.

Because the warrant for the seizure of oral communications was based on probable cause, the question becomes whether or not the manner of executing the warrant was unreasonable.

The majority of cases concerning the manner of entry pursuant to a warrant are framed in terms of whether or not the manner of entry and/or execution of the warrant were so excessive as to be unreasonable under the fourth amendment.

Thus where real property is involved, there is the general requirement that officers must give notice of their authority and purpose and be refused entry before they may break into the premises to be searched. 18 U.S.C. §3109. The general purposes of this requirement are to protect against unnecessary breaches of the peace, and prevent embarrassing sudden exposure of private activities. *See United States v. Bustamante-Gamez,* 488 F.2d 4, 11-12 (9th Cir. 1973), *cert. denied,* 416 U.S. 970 (1974).

In *United States v. Gervato,* 474 F.2d 40 (3d Cir.), *cert. denied,* 414 U.S. 864 (1973), the court held that there is also no requirement that the premises be occupied at the time of a search. In *Gervato,* the agent knew by surveillance that the premises were unoccupied. The agent forced open the door and conducted the authorized search. The court, in its analysis, outlined the history of the fourth amendment and indicated that its primary purpose was to put an end to general searches and warrants, i.e., to insure that the place and property to be seized were particularly described. *Id.* at 41-44.

Portion of Decision of the United States District Court for the District of New Jersey dated January 11, 1977 Relating to Surreptitious Entry

It should be noted that there was no indication in *Gervato* that the agent should have received a court order to "break and enter" the premises.

The reasonableness of the manner of carrying out a search has also been considered in relation to body searches. Even in such searches involving intrusions into the human body, there is no requirement that prior judicial authorization be required. In *United States v. Mastberg,* 503 F.2d 465 (9th Cir. 1974), the court found that "real suspicion" and not independent judicial authorization is sufficient for a vaginal body-cavity search.

In *Rochin v. People of California,* 342 U.S. 165 (1952), it was held that stomach pumping evidence should be suppressed because it "shocked the conscience of the Court" and offended its source of decency and not because of lack of prior judicial authorization.

The affidavits which supported the application for the warrant in question indicated that resort to electronic surveillance, to overhear meetings at Dalia's office and conversations on Dalia's telephones, was required to identify the sources of Dalia's stolen goods, those working with him to transport and store stolen property, and the scope of the conspiracy. Oral evidence of this criminal enterprise was only available inside Dalia's business premises. On this set of facts, I find that the safest and most successful method of accomplishing the installation of the wiretapping device was through breaking and entering the premises in question. Dalia in fact stated that, to the best of his knowledge, it would be impossible to install such a device in that location without gaining access to the building forcibly. Affidavit of Dalia at ¶4. In most cases the only form of installing such devices is through breaking and

entering. The nature of the act is such that entry must be surreptitious and must not arouse suspicion, and the installation must be done with the knowledge of the residents or occupants.

Once a showing of probable cause is made to support the issuance of a court order authorizing electronic surveillance, thereby sanctioning the serious intrusion caused by interception, implicit in the court's order is concomitant authorization for agents to covertly enter the premises in question and install the necessary equipment. *See United States v. Altese,* Crim. No. 75-341, slip op. at 52 (E.D.N.Y. Oct. 14, 1976). The court in *Altese* held that:

> Entry to install bugging devices is but a mere condition precedent that must necessarily be satisfied if the purpose behind an intercept order is to be effectuated. Entry to initiate surveillance is not another intrusion. Hence there need not be express authorization in the intercept order that issues for that prerequisite.

Id. at 53. I agree with this rationale and find that under these circumstances, notwithstanding the decision in *Ford,* it was not necessary for the government to obtain explicit judicial approval of an otherwise illegal breaking and entering for the purpose of installing an electronic eavesdropping device.

* * *

APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1722

LAWRENCE DALIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 2, 1978
CERTIORARI GRANTED OCTOBER 2, 1978

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Docket No. 75-488-1

UNITED STATES OF AMERICA,

vs.

LAWRENCE DALIA,

Defendant.

Charges:

18 - 371	Conspiracy. (Ct. 1)
18 - 1951	Conspiring to obstruct Comm. by robbery & threats of violence. (Ct. 2)
18 - 2314	Transporting in In. Comm. stolen goods. (Ct. 3)
18 - 2315	Rec. & conc. goods stolen in In. Comm. (Ct. 4)
18 - 659	Poss. goods stolen from In. Comm. (Ct. 5)

Date	Proceedings
11-10-75	Indictment filed 11-6-75.
5-3-76	Notice of Motion of defendant for an evidentiary hearing upon manner in which certain oral and telephonic communications were intercepted; suppression of results of illegal electronic interceptions and adjournment of trial; proof of service filed 4-29-76. (Memorandum of law attached)

Relevant Docket Entries

5-12-76	Order granting defendant's motion for extension of time to file pretrial motions and fixing dates for hearing and the filing of briefs filed 5-7-76. (Lacey) Notice mailed
5-25-76	Notice of Motion of Defendant for suppression of results of electronic surveillance and for an evidentiary hearing returnable June 14, 1976, proof of service filed 5-24-76. (Brief submitted)
6-15-76	Hearing on motion of defendant for suppression of results of electronic surveillance and for an evidentiary hearing. Ordered motion re evidentiary hearing granted. Ordered motion re suppression continued to June 15, 1976. (Lacey) (6-11-76)
6-17-76	TRIAL MOVED BEFORE HON. FREDERICK B. LACEY, Judge and Jury. (6-15-76) Jury Sworn Hearing on defendant's application for suppression of evidence re electronic surveillance. Ordered application denied, Hearing on defendant's renewed application for an evidentiary hearing. Ordered application denied. Trial adjourned to 6-16-76.
6-18-76	TRIAL CONTINUED. (6-16-76)
6-21-76	TRIAL CONTINUED. (6-17-76)
6-22-76	TRIAL CONTINUED. (6-18-76) Hearing on defendant's application for *judgment of acquittal. Ordered application granted as to Counts 2 and 3.* Ordered application denied as to Counts 1, 4 and 5. VERDICT: Guilty on Counts 1 and 4. Not Guilty on Count 5.

Relevant Docket Entries

6-22-76	Evidentiary hearing on defendant's motion for suppression of evidence re tapes. Decision reserved. (Lacey) (6-18-76)
8-3-76	Evidentiary hearing on defendant's application for dismissal of Indictment re wiretap installation and procedure. Ordered evidentiary hearing continued to September 13, 1976. (Lacey) (7-29-76)
9-13-76	Hearing on application of defendant for dismissal of indictment or for a new trial re electronic surveillance. Ordered hearing continued to Oct. 4, 1976. (Lacey) (9-9-76)
11-12-76	Continued hearing on application of defendant for dismissal of indictment or for a new trial re electronic surveillance. DECISION RESERVED. (Lacey) (11-8-76)
1-13-77	Opinion filed 1-13-77. (Lacey) (denying defendant's motion to suppress tapes)
1-28-77	SENTENCE: Ct. 1 — Five years. Ct. 4 — Five years to run concurrent with sentence imposed on Ct.1. (Lacey) (1-24-77)

Relevant Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 77-1277

UNITED STATES OF AMERICA

vs.

DALIA, LAWRENCE,

Appellant

Date	Proceedings
2-23-77	Certified copy of Notice of Appeal, received February 9, 1977, filed.
1-5-78	Argued. Coram: Rosenn and Higginbotham, C.J. and Van Artsdalen, D.J.
5-3-78	Opinion of the Court (Rosenn and Higginbotham, C.J. and Van Artsdalen, D.J.*), filed. * Hon. Donald W. Van Artsdalen, U.S.D.J. for the Eastern Dist. of Pa., sitting by designation.
5-3-78	Judgment affirming the judgment of the district court, filed January 27, 1977, filed.
5-18-78	Motion by appellant for stay of mandate pending application for certiorari, filed. (4cc) Service in letter dated May 15, 1978.

Relevant Docket Entries

5-22-78	Order (Higginbotham, C.J.) staying the issuance of the mandate until June 2, 1978, filed.
6-8-78	Notice of filing on June 2, 1978 of petition for writ of certiorari, received from Clerk of S.C., filed. (S.C. No. 77-1722)
10-5-78	Certified copy of order dated October 2, 1978 granting the petition for writ of certiorari to the U.S. Court of Appeals for the Third Circuit, limited to Question 1 presented by the petition, received from Clerk of S.C., filed. (S.C. No. 77-1722)

ORDER DATED APRIL 5, 1973 BY HONORABLE FREDERICK B. LACEY, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS

Misc. No._____

AUTHORIZING INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS

TO: Special Agents of the Federal Bureau of Investigation
United States Department of Justice

Application under oath having been made before me by James M. Deichert, an attorney with the Organized Crime and Racketeering Section of the United States Department of Justice, and an "investigative or law enforcement officer", as defined in Section 2510(7) of Title 18, United States Code, for an Order authorizing the interception of wire and oral communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) There is probable cause to believe that Larry Dalia and others as yet unknown, have committed and are committing offenses involving theft from interstate shipments, in violation of Title 18, United States Code, Section 659; sale or receipt of stolen goods; in violation of Title 18, United States Code, Section 2315; and interference with commerce by threats or violence, in violation of Title 18, United States Code, Section 1951; and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code.

Order Dated April 5, 1973 by Honorable Frederick B. Lacey, U.S.D.J.

(b) There is probable cause to believe that particular wire and oral communications concerning these offenses will be obtained through these interceptions, authorization for which is herewith applied. In particular, these wire and oral communications will concern the theft or robbery of goods moving in interstate commerce, and the transportation, sale, receipt, storage, or distribution of these stolen goods, and the participants in the commission of said offenses.

(c) Normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) There is probable cause to believe that the telephone subscribed to by Precise Packaging, located at 1105 West St. George Avenue, Linden, New Jersey, and bearing telephone number (201) 486-6433; and the telephone subscribed to by Wrap-O-Matic Machinery Company, Ltd., located at 1105 West St. George Avenue, Linden, New Jersey, and bearing the telephone number (201) 382-7665, have been and are being used by Larry Dalia and others as yet unknown in connection with the commission of the above-described offenses.

(e) There is probable cause to believe that the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, and situated in the northwesterly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey, has been used, and is being used by Larry Dalia and others as yet unknown in connection with the commission of the above-described offenses.

Order Dated April 5, 1973 by Honorable Frederick B. Lacey, U.S.D.J.

WHEREFORE, it is hereby ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to application authorized by the Attorney General of the United States, the Honorable Richard G. Kleindienst, under the power conferred on the Acting Attorney General by Section 2516 of Title 18, United States Code, to:

(a) Intercept wire communications of Larry Dalia, and others as yet unknown, concerning the above-described offenses to and from the telephone subscribed to by Precise Packaging, located at 1105 West St. George Avenue, Linden, New Jersey, and bearing telephone number (201) 486-6433; and Wrap-O-Matic Machinery Company, Ltd., located at 1105 West St. George Avenue, Linden, New Jersey, and bearing the telephone number (201) 382-7665, which have been and are being used by Larry Dalia and others as yet unknown in connection with the commission of the above-described offenses.

(b) Intercept oral communications of Larry Dalia, and others as yet unknown, concerning the above-described offenses at the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, and situated in the northwesterly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey.

(c) Such interceptions shall not automatically terminate when the type of communication described

Order Dated April 5, 1973 by Honorable Frederick B. Lacey, U.S.D.J.

above in paragraphs (a) and (b) have first been obtained, but shall continue until communications are intercepted which reveal the manner in which Larry Dalia and others as yet unknown participate in theft from interstate shipments; sale or receipt of stolen goods; and interference with commerce by threats or violence; and which reveal the identities of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of twenty (20) days from the date of this Order, whichever is earlier.

It is further ordered upon request of applicant, that the New Jersey Bell Telephone Company, a communication carrier as defined in Section 2510(1) of Title 18, United States Code, shall furnish the application forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted the furnishing of such facilities or technical assistance by the New Jersey Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

PROVIDING THAT, this authorization to intercept oral and wire communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective, of in any event, at the end of twenty (20) days from the date of this Order.

PROVIDING ALSO, that Special Attorney James M. Deichert shall provide the Court with a report on the fifth,

Order Dated April 5, 1973 by Honorable Frederick B. Lacey, U.S.D.J.

tenth, and fifteenth day following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

s/ Lacey
UNITED STATES DISTRICT JUDGE

s/ April 5, 1973
5:35 P.M.
DATE

Conformed
JMD
5 April 73

ORDER DATED APRIL 27, 1973 BY HONORABLE FREDERICK B. LACEY, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS

Misc. No. 17-73

AUTHORIZING INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS

TO: Special Agents of the Federal Bureau of Investigation
United States Department of Justice

Application under oath having been made before me by James M. Deichert, an attorney with the Organized Crime and Racketeering Section of the United States Department of Justice, and an "investigative or law enforcement officer", as defined in Section 2510(7) of Title 18, United States Code, for an Order authorizing the interception of wire and oral communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) There is probable cause to believe that Larry Dalia and others as yet unknown, have committed and are committing offenses involving theft from interstate shipments, in violation of Title 18, United States Code, Section 659; sale or receipt of stolen goods; in violation of Titie 18, United States Code, Section 2315; and interference with commerce by threats or violence, in violation of Title 18, United States Code, Section 1951; and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code.

Order Dated April 27, 1973 by Honorable Frederick B. Lacey, U.S.D.J.

(b) There is probable cause to believe that particular wire and oral communications concerning these offenses will be obtained through these interceptions, authorization for which is herewith applied. In particular, these wire and oral communications will concern the theft or robbery of goods moving in interstate commerce, and the transportation, sale, receipt, storage, or distribution of these stolen goods, and the participants in the commission of said offenses.

(c) Normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) There is probable cause to believe that the telephone subscribed to by Precise Packaging, located at 1105 West St. George Avenue, Linden, New Jersey, and bearing telephone number (201) 486-6433; and the telephone subscribed to by Wrap-O-Matic Machinery Company, Ltd., located at 1105 West St. George Avenue, Linden, New Jersey, and bearing the telephone number (201) 382-7665, have been and are being used by Larry Dalia and others as yet unknown in connection with the commission of the above-described offenses.

(e) There is probable cause to believe that the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, and situated in the northwesterly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey, has been used, and is being used by Larry Dalia and others as yet unknown in connection with the commission of the above-described offenses.

Order Dated April 27, 1973 by Honorable Frederick B. Lacey, U.S.D.J.

WHEREFORE, it is hereby ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to application authorized by the Attorney General of the United States, the Honorable Richard G. Kleindienst, under the power conferred on the Acting Attorney General by Section 2516 of Title 18, United States Code, to:

(a) Intercept wire communications of Larry Dalia, and others as yet unknown, concerning the above-described offenses to and from the telephone subscribed to by Precise Packaging, located at 1105 West St. George Avenue, Linden, New Jersey, and bearing telephone number (201) 486-6433; and Wrap-O-Matic Machinery Company, Ltd., located at 1105 West St. George Avenue, Linden, New Jersey, and bearing the telephone number (201) 382-7665, which have been and are being used by Larry Dalia and others as yet unknown in connection with the commission of the above-described offenses.

(b) Intercept oral communications of Larry Dalia, and others as yet unknown, concerning the above-described offenses at the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, and situated in the northwesterly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey.

(c) Such interceptions shall not automatically terminate when the type of communication described above in paragraphs (a) and (b) have first been obtained,

Order Dated April 27, 1973 by Honorable Frederick B. Lacey, U.S.D.J.

but shall continue until communications are intercepted which reveal the manner in which Larry Dalia and others as yet unknown participate in theft from interstate shipments; sale or receipt of stolen goods; and interference with commerce by threats or violence; and which reveal the identities of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of twenty (20) days from the date of this Order, whichever is earlier.

It is further ordered upon request of applicant, that the New Jersey Bell Telephone Company, a communication carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the application forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted the furnishing of such facilities or technical assistance by the New Jersey Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

PROVIDING THAT, this authorization to intercept oral and wire communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective, of in any event, at the end of twenty (20) days from the date of this Order.

PROVIDING ALSO, that Special Attorney James M. Deichert shall provide the Court with a report on the fifth,

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tenth, and fifteenth day following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

27 April 73
Conformed Copy JMD

s/ Lacey
UNITED STATES DISTRICT JUDGE

27 April 72
DATE

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED JUNE 15, 1976 BEFORE HONORABLE FREDERICK B. LACEY, U.S.D.J.

[Commencing at page 1.3]

THE COURT: United States v. Dalia.

All right, Gentlemen, we had some open matters before we got to the jury. Is that right.

MR. RUPRECHT: That's correct, your Honor.

THE COURT: Mr. Deichert, do you want to make a statement for the record that will lead into our consideration of the open matters?

MR. DEICHERT: Your Honor, as I understand the state of the motions now, we have one motion for determination of whether the entry by the agents without the consent of the owner of the premises, the oral electronic surveillance has infected the subsequent interceptions with taint.

The second one would be the minimization issue.

The third one would be that the extensions second and third court orders were legally and factually insufficient.

THE COURT: All right.

Let's deal first with the matter of the entry of the agent.

Do you want to state your position again, Mr. Ruprecht, please?

MR. RUPRECHT: Yes, your Honor.

Excerpts of Transcript of Proceedings Dated June 15, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

As far as legal argument goes, there is no [1.4] case that is directly on point other than apparently an unreported case that Mr. Deichert advised me of yesterday afternoon and that is a case decided by Judge Gesell on April 23, 1976.

In that case the agents informed the judge to whom they were making an application to intercept oral communications, that they wished to install a listening device; that they thought they would have to do it by either a break-in or by gaining entry through a ruse.

The matters were discussed with the Court. The Court specifically told the agents that the Court did not care if they used either a ruse or a break-in entry and gave them specific authority to break and enter, or to make entry through a strategem.

The officers did on two occasions, through a bomb scare, enter and install the listening device.

The matter then came before Judge Gesell on a motion to suppress. He was not the issuing judge and he found that the order of authorization was too broad.

The statute under which the authorization was granted apparently is identical to the Omnibus Crime Control Act that contains Title 3.

It was a particular statute just applicable to the District of Columbia.

But Judge Gesell found that this order was too [1.5] broad in that it did not put any controls on the agents as to what they might do when they were in there.

He intimated that probably the part of the order in which the agents were given the authority to break and enter was unconstitutional; although he did not have to face directly that issue. That issue is directly faced by your Honor.

The case that was decided by Judge Gesell, U.S. v. Ford and others, is one that is not nearly as strong as this case because in this case I am led to believe that the agents did make an otherwise unlawful entry in order to install the listening device.

I have not been furnished with any affidavits and I do not know whether your Honor has. I would request that I be given those affidavits so I can see exactly what it was that the agents did and I can make a better factual argument as to why this would be impermissible.

Again, I don't know what the agents may have done, if anything, about advising your Honor in advance as to their intentions. And, again, I would want to find out more about that.

I would want to find out what they did once they were in there and I'd like to find out why they had to or thought they had to conduct this type of an entry and why other types of less obnoxious methods of securing [1.6] this information would not be plausible.

Judge Gesell in his opinion discussed the possibility of parabolic microphones and spike microphones. And, of course, there's many other ways a person can think of of overhearing conversations without being a party to those conversations.

In short, I am making a request I be furnished with more factual information. But the general legal argument I'm making

is that Title 3 simply does not consider this type of action on the part of the officers engaged in electronic surveillance. There is absolutely no authority given in Title 3 for this. It is not implicit in it and at the very least the overseeing Court must be advised of something as important as this, namely, something so out of keeping with the way we consider fair play to be in our society that it should be for the Court to set the guidelines, to set the rules to be advised and to be in control of the situation at all times.

THE COURT: Well, how does the intrusion into an office space which would ordinarily be illegal how does that differ from an intrusion by electronic surveillance on a telephone?

MR. RUPRECHT: Because the officers are making the entry themselves and they're making an entry into a person's quarters without his knowledge, with no supervision [1.7] over their activities and unbeknownst to the judge who is supposed to be supervising this whole activity. And that, I think, is the especially dangerous part of this entire operation, that it is hidden from the overseeing court. The overseeing court has not imposed guidelines on the officers, they haven't told the officers what they may or may not do. The Court has not made any judgment as to whether or not an entry of this type is really necessary, whether or not there are other alternatives to this type of illegal entry that would not run the risks that would be attendant with this, that would not be subject to such abuse as this.

There is no way of knowing what these officers may have done in there other than their self-serving declarations. And they were without guidelines because as near as I can find from the applications that were made before your Honor, your Honor was never advised, at least on paper, that this is what the officers intended to do.

Excerpts of Transcript of Proceedings Dated June 15, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

And it certainly, I think, is fair to say that if the officers intended to do such a thing the overseeing judge should have been advised of it and he might have well said: "Isn't there another way you can do this? Shouldn't you make some sort of a showing to me before I give you the right to break into someone's office?"

And, again, shouldn't the overseeing Court say: [1.8] "All right, I will let you do it but this is exactly what I am going to require."

And then lay down some guidelines as to what these officers may and may not do, what persons ought to be present, what type of a record should be made immediately after the fact.

For example, it might well be that because of the unusual nature of a break-and-entry that the Court might want to interrogate the officers immediately after they have gone on this covert operation.

The whole operation is so unusual, so out of keeping and so different than just going to a telephone company and saying: "May we tie in to one of your lines that happens to be in this man's office?" It's so different in kind from that type of thing that it demands specific attention from the Court and it demands that the Court be fully advised at all times of what's going on here.

THE COURT: All right.

Let's see — let me have that affidavit, please.

MR. DEICHERT: Your Honor, there is one additional affidavit from an FBI employee and I had to Thermofax these copies to two other offices outside the State and I was unable to

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get the one back because of a technical problem with the Thermofax. As soon as I get it, [1.9] I will submit it. It merely parrots or mirrors the affidavits of the other two agents.

THE COURT: All right.

Now, Mr. Ruprecht raised one question that we can deal with I think immediately.

Whether there was any discussion between the attorney who oversaw this matter and the agent on the one hand and the Court on the other.

My own recollection is that there was no such discussion. I'd like to hear from you on this.

MR. DEICHERT: Yes, your Honor, that's correct.

The advice to the Court came in the form of the progress report. The first progress report I was submitted, I would assume, on the tenth or eleventh of April.

THE COURT: Look. I'm simply asking this —

MR. DEICHERT: No, there was —

THE COURT: Listen carefully to my questions.

I always have trouble with you. You don't listen to my questions.

Was there any discussion between you and the agent on the one hand and me on the other as to how this order was going to be carried out?

Excerpts of Transcript of Proceedings Dated June 15, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

MR. DEICHERT: No.

THE COURT: All right.

[1.10] That was one question that you wanted asked.

MR. RUPRECHT: That's correct, your Honor.

THE COURT: Now, before we get into the affidavits — and I'll deal with that in a moment — I think your record also ought to reflect you have raised this as another issue. I think your record also reflected a response to that issue.

My recollection, again, is that I gave no limiting instructions on how my order was to be carried out.

MR. DEICHERT: That's correct.

THE COURT: And my recollection further is that I did not explore afterwards how my order was carried out. Is that correct? In terms of how the entry was made.

MR. DEICHERT: Yes, that's correct as well.

THE COURT: Is that correct?

I don't have any recollection of having done that.

But I nonetheless wanted to rely on your recollection as well.

All right.

Excerpts of Transcript of Proceedings Dated June 15, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

Now, I have an affidavit which is not executed. This is from an Agent Suter.

I see you do have the execution on this on the [1.11] fourth page.

MR. DEICHERT: Yes, sir.

THE COURT: Mark these two affidavits, Miss Healy. The Suter affidavit as Court 1 on this hearing.

THE CLERK: Marked Court's Exhibit 1 for identification.

(C-1 marked for identification.)

THE COURT: And then the McCluan affidavit as Court Exhibit 2.

THE CLERK: Marked Court's Exhibit 2 for identification.

(C-2 marked for identification.)

THE COURT: All right.

Your position, I take it, Mr. Ruprecht, is that the statute is unconstitutional?

MR. RUPRECHT: No.

My position is not that the statute is unconstitutional because the statute does not specifically authorize a break and entry. If the statute did specifically authorize a break and entry then I would make an argument it was unconstitutional in that respect.

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I would also alternatively argue that if that portion of the statute, hypothetically, that gave the right to break and enter gave it under the aegis of the Court then in this instance this would be violative of [1.12] what would be constitutionally required to have a break and entry. A lack, a total lack of any type of overseeing by the Court itself.

If the statute by its silence is deemed to include a right on the part of the officer to break and enter then I would agree the statute is unconstitutional. But I don't concede that that's what the statute means. And I don't think that there is any warrant for that type of an interception.

But if this Court does feel that giving the officers a right to overhear conversations other than wire tapping implies covert entries then clearly it must also imply judicial supervision of that important aspect of the operation.

THE COURT: All right.

What is your response to that position, which I think is clearly stated and calls for a response?

MR. DEICHERT: Your Honor, I think the statute does, in Section 4 of 2518: "By allowing an order to command the agent to secure the assistance of a common carrier, landlord, custodian or other person to accomplish the interception unobstrusively and with a minimum of interference" that it does expressly allow an entry to be made into a private residence or private building without the consent of the owner or the landlord, for that matter.

[1.13] THE COURT: Or the tenant.

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MR. DEICHERT: I'm sorry?

THE COURT: Or the tenant.

MR. DEICHERT: Yes, sir.

The Ford decision that I brought to the Court's and counsel's attention yesterday, in fact, does recognize that Congress implicitly in its — the course of legislating Title 3 would allow a surreptitious entry. That's at the top of page 6. Pertinent quote: "Since the statute does not bar the use of such devices by the police, Congress must be taken to at least have granted or impliedly recognized the general power of the Court to authorize a covert or possibly otherwise illegal entry to place a 'bug' under some circumstances."

The argument that the Government would advance would be twofold. First, that the entry itself is not a search and that the statute authorizes the entry and circumstances of installing electronic surveillance device.

Secondly that the entry is not the search. That the interception of the sounds through the microphone is the search. And under the Fourth Amendment aspect if it's — the Court determines this is a search that it is not an unreasonable search.

Under the Fourth Amendment the — there are [1.14] interceptions to the — withdrawn.

Under the Fourth Amendment I think that the two clauses that can be seen are, one, the warrant clause and the other the aspect of reasonableness of search. And I think that grows out of the vice of the general warrants that were abounding two hundred years ago and that is the vice of an executive officer,

not a judicial officer, without a finding of probable cause issuing a warrant to seize not specified and not particularized items of property; and that the general warrants were trespassory in nature.

I think Katz, the 1967 Supreme Court case, dealing with electronic surveillance, recognizes that although the agents — the electronic surveillance was illegal if requirements could be met under the scope of prior judicial approval, specificity of the warrant, et cetera, that electronic surveillance can come under the Fourth Amendment.

Under the reasonableness of the search aspect — because we do have a warrant here, that is specific, specifically drawn and narrowly drawn — the reasonableness of the search, I think, there are several analogies I would advance. One, I put today in the form of the body cavity search which can take place without a warrant, which can take place upon reasonable suspicion and the entry into the human body I would concede is a much higher invasion of [1.15] personal privacy and liberty than the physical entry into a building that's not a domicile.

And I think under the cases of Rochin and Schmerber that the type of entry, for instance, the physical entry into a building is not that which would come under of those of shocking the Court's conscience or, respectfully, it would come under the terms of being violative of the nature of the Constitution.

We have, for instance, in this Circuit, case law in Gervato, a Third Circuit case, which held that advance notice and prior judicial authority is not required to execute a search warrant. And instances where the subject is not present at the premises to be searched and where the agent did force an entry and the search was upheld.

Gervato and some of the other cases dealing with Rule 41, Federal Rule of Criminal Procedure, indicate the rule to be followed. And expressly Rule 41 indicates a definite procedure that can be followed if no one is present at the place of the search and that is the leaving of an inventory.

Here we have the leaving of an inventory pursuant to Title 3 which originally was required within 90 days. In this case it was extended upon an application ex parte to the Court by the Government.

[1.16] The defendant was inventoried. The defendant has been served with the opportunity to have access to all the contents of the fruits of the search and we feel that these protections under Title 3, and the manner in which this case was executed do, indeed, constitute a reasonable search. And that the search was not the entry, that the search only comes from the oral surveillance overhearing a particular conversation.

I would submit on the briefs unless the Court has additional questions.

THE COURT: All right. Let me just read something in the Ford opinion.

All right. I think that the only fair thing to do on this application would be to make available to Mr. Ruprecht the affidavits or copies of the affidavits that are submitted. I therefore would direct that they be — copies be made available, Mr. Deichert.

MR. DEICHERT: I have provided copies, your Honor.

THE COURT: All right.

Excerpts of Transcript of Proceedings Dated June 15, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

On this aspect I think I'll proceed in this fashion. I'm going to reserve on this aspect of the application until the conclusion of the trial.

Well, perhaps I should do it this way. I'm going to deny this application — this aspect of the [1.17] application that I gather can be stated in these terms. It's an application to suppress founded upon lack of judicial supervision of the manner in which the order was implemented or executed.

Does that state it fairly?

MR. RUPRECHT: That does. And also that the statute itself does not provide for covert entries. That it is a misreading of the statute to gather from it that the authorities were warranted in doing this anyway.

THE COURT: All right.

So, in effect, you're claiming a Fourth Amendment violation.

MR. RUPRECHT: Exactly.

THE COURT: All right.

Now, there's another aspect to this and that is that Mr. Ruprecht had asked for an evidentiary hearing.

And as to that I'm going to deny that but without prejudice to renewal at the close of the trial.

* * *

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED JULY 29, 1976 BEFORE HONORABLE FREDERICK B. LACEY, U.S.D.J.

[Commencing at page 21 line 11]

* * *

MR. RUPRECHT: The remaining motion this morning would deal with the entry into Mr. Dalia's place of business by FBI agents in order to install the electronic device occurring on, I believe, April 5, 1973, and then a re-entry sometime in May of 1973.

THE COURT: Who's the agent that did that, Mr. Deichert?

MR. DEICHERT: There are three agents, your Honor. I have them present. Their affidavits were previously submitted in camera under seal. And the protective order was granted by the Court to limit Mr. Ruprecht's access to them, to him personally.

THE COURT: Suppose you bring in the agent then.

[22] NEIL E. PRICE, called as a witness on behalf of the government, being first duly sworn, testifies as follows:

THE COURT: All right, Mr. Deichert.

DIRECT EXAMINATION BY MR. DEICHERT:

Q. Agent Price, how are you employed? A. Special Agent with the Federal Bureau of Investigation.

Q. And how long have you been so employed in that capacity? A. Approximately nine years.

Q. Where were you employed in March of 1973? A. The Newark office of the FBI.

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Q. Now, did there come a time when you went to 1105 West St. George Avenue, Linden, New Jersey? A. Yes, sir.

Q. And when was that? A. Sometime in 1971. The spring.

Q. I'm sorry? A. The spring.

Q. Of what year? A. 1971.

Q. And how long after the initial time that you went did you have occasion to learn that a court-ordered [23] electronic surveillance order had been signed granting electronic surveillance at that premises? A. Sir, how long before?

Q. Yes. A. Several weeks.

THE COURT: Mr. Deichert, we have a very narrow issue here. Can we get to it?

MR. DEICHERT: Yes, Judge.

Q. And were you aware there was an order signed on April the 5th, 1973, for Mr. Dalia's premises? A. Yes, sir.

I'm sorry, I said 1971; I meant 1973.

Q. In March of 1973 what happened? At Mr. Dalia's premises. A. Well, we were advised that a court order had been signed for installation of a microphone —

THE COURT: Wait a minute.

Are you telling me the order was signed April 5th, '73?

MR. DEICHERT: Yes.

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THE COURT: Now you asked him what happened in March of '73?

MR. DEICHERT: Yes.

THE WITNESS: Oh, I'm sorry. March.

THE COURT: Will you lead the witness and get [24] to the area we're interested in.

BY MR. DEICHERT:

Q. Before the electronic surveillance order was signed granting oral — the implantation of an oral device, did you have occasion to visit Mr. Dalia's premises to surveil it? A. We did not go to his premises but we surveilled it from areas nearby.

Q. And did you enter the premises on that date? A. On the 5th?

Q. In March. Before the order was signed. A. No, sir.

Q. Okay.

Now, directing your attention to the 5th of April, 1973, you learned there was a court order signed, as I understand, for an oral microphone. A. Yes.

Q. What did you do on the 5th? A. In the early evening we went out and laid some wire around the back of his property back to the shopping center. And approximately midnight myself and some other agents entered the premises, installed a microphone, tested it and then departed.

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Q. Now, how was the entry made on that occasion? A. Through a side window.

[25] Q. And what was the lighting inside? A. There was no lighting.

Q. And when you were inside the premises did you seize or take anything? A. No, sir.

Q. Did you disclose anything that — withdraw that.

Did you tell the FBI agents who did not enter the premises what you had found inside or what you had done inside? A. No, sir.

Q. Now, during the period of time April the 6th through May the 15th, 1973, did you have occasion to re-enter Mr. Dalia's business? A. No, sir.

Q. Did you have occasion to re-enter on or about the 16th of May? A. Yes, sir.

Q. On that occasion what was done? A. We removed the microphone.

Q. And did you take anything from Mr. Dalia's premises? A. No, sir.

Q. Did you pass any information that you had learned while you were in Mr. Dalia's business to any other agent? [26] A. No, sir.

MR. DEICHERT: Cross-examine.

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CROSS-EXAMINATION BY MR. RUPRECHT:

Q. Agent Price, did you prepare any reports dealing with your activities on the day the microphone was installed or removed? A. No, sir.

Q. Was there any reason why you did not prepare any such report?

THE COURT: No. I'm not interested in that. He said he's prepared none.

MR. RUPRECHT: All right.

Q. Agent Price, when you —

THE COURT: It's a very narrow issue, Mr. Ruprecht. Let's get to it, as I told Mr. Deichert.

Q. When you received your orders with respect to the installation of this listening device, did you receive them from a superior or was it from someone on a co-equal level as yourself? A. No, I was advised by my supervisor a court order had been signed.

Q. Okay.

Who gave you the instructions to install the microphone? [27] A. He advised me that the court order was signed for the installation of a microphone.

Q. And who was that? A. Jim Laughlin.

Q. What's his name? A. Jim Laughlin.

Excerpts of Transcript of Proceedings Dated July 29, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

Q. And what was Mr. Laughlin's position?

THE COURT: What's the purpose of this, Mr. Ruprecht?

MR. RUPRECHT: I think the manner of supervision, what was said and conveyed to the agents who actually performed the work might be at the very heart of this issue.

THE COURT: He has told you what he was told.

Did he tell you anything else?

THE WITNESS: No, sir.

BY MR. RUPRECHT:

Q. Did anybody instruct you as to the method or manner you were to perform your tasks? A. In that particular instance, no sir.

Q. Did anybody give you any instructions as to what you were to do with respect to the manner in which the device should be installed or where it should be installed? A. No, sir.

Q. How many agents participated in the installation of this microphone? [28] A. Three.

Q. How many agents participated in the removal of the microphone? A. Two.

Q. Were the two agents who participated in the removal the same as two of the three who installed it? A. Yes.

Q. And you participated in the removal, too; is that correct? A. Yes, that's correct.

Excerpts of Transcript of Proceedings Dated July 29, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

Q. Who were the two others who participated in the installation? A. Agent Seuder and Agent McCluan.

Q. Were either of them superior to you? A. No, sir.

Q. And all of them were special agents of the FBI? A. That's correct.

Q. Was there any type of briefing session held before the installation of this microphone with any of your superiors with respect to what you should do during the time you were installing this microphone? A. Yes.

Q. And who held such a session? A. The general rule was for — I would call a conference or a meeting and we would discuss how we were [29] going to install the microphone, what our plan was.

And we discussed the various backups we needed or assistance.

Q. Was this just a session with you and the other two agents who installed it? A. We would have myself, the other two agents, supervisor, possibly any other agents that would be involved on the street.

Q. Did you participate in the preparation of any documents or affidavits for submission to the overseeing court dealing with the installation of a listening device? A. No, sir.

Q. Did you have any briefing sessions or instruction sessions with any member of the Department of Justice's legal staff or the U.S. Attorney's Office dealing with the manner in which this installation should be performed? A. Not that I recall.

Excerpts of Transcript of Proceedings Dated July 29, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

Q. Or the manner in which the entry should be performed? A. No, sir.

Q. Approximately —

THE COURT: Just a minute, Mr. Ruprecht.

Go ahead, sir.

Q. Approximately what time did you arrive at the place of business of Mr. Dalia on the night that the [30] installation was made? A. Early evening.

Q. And approximately what time did you actually enter the premises? A. I would say around midmight.

Q. And which was your route of entry? What was your route of entry? A. Through a side window.

Q. Do you know what that side window led to? A. An area in the back of the building. It had a lot of machines that clicked all night.

Q. And how about when you removed the microphone, do you recall what your method of access was? A. Same window.

Q. Was it a bathroom window? A. No. There was a refrigerator next to it that I can remember.

Q. When you made this entry did all three officers actually go inside the place? A. At one time or another, yes.

Q. All right.

Was there always one officer outside? A. No.

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Q. Were you accompanied by any other people from the FBI, local police departments, U.S. Attorney's Office [31] or Strike Force attorneys who did not themselves enter the place of business but were present at the scene? A. No, sir. The only other person other than the three of us was at the scene was agents on the street.

Q. And approximately how many of them were there?

THE COURT: Well, I really don't see this as material.

MR. RUPRECHT: All right.

THE COURT: Now, I wanted to find out how entry was gained. What he did when he was inside. I permitted the hearing for that very limited purpose.

MR. RUPRECHT: Fine.

THE COURT: Let's stay within the boundary.

BY MR. RUPRECHT:

Q. Where did you first go after making entry? A. We looked to make sure there was no one else in there for our safety and the safety of anyone else in there.

Q. And did you look all throughout the building to see if anyone was there? A. Yes, sir.

Q. Did all of the agents look throughout the building? A. No, sir. The two of us that entered initially were the ones that did the look.

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Q. Who was the other man? [32] A. Agent McCluan.

Q. And Agent Seuder was outside at this time? A. That's correct.

Q. How long did this looking throughout the building take? A. A few minutes.

Q. And then what next happened? A. Then we proceeded to the office area where we intended to install the microphone.

Q. Did you know in advance where you were going to put this microphone? A. Well, I think as I recall the court order specified that it was to be in a certain area of the room. Certain area of the building, an office area.

Q. So you knew that it had to be installed in that office. A. That's correct.

Q. And did you know from either a diagram of the building or a past experience or someone else telling you what the inside of the building would look like and where the office area would be? A. I believe I had a rough idea of what the floor plan was like.

Q. Okay.

Where in the office did you then go? [33] A. Well, it's not very big. You can't go very far. To the center.

We looked at the office to see where would be the best place to conceal a microphone.

Q. How large an office was it?

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THE COURT: I'm interested in one thing. Where did you conceal it?

THE WITNESS: In the ceiling.

THE COURT: Where did you put it in the ceiling?

THE WITNESS: In the acoustical tile above the ceiling.

THE COURT: With respect to — was there a desk there?

THE WITNESS: Yes, there was.

THE COURT: Did you put it above the desk?

THE WITNESS: Approximately above the center of the desk.

THE COURT: Any other questions?

BY MR. RUPRECHT:

Q. Approximately how long were you in the office?

THE COURT: That I'll permit.

How long were you there?

THE WITNESS: With running wire and back and forth in the building or the office?

Q. The office. [34] A. In and out, maybe a half an hour total.

Excerpts of Transcript of Proceedings Dated July 29, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

Q. And how about in the building? A. Two or three hours.

Q. During this period of time would you occasionally leave the building?

THE COURT: Now, what else is material about this inquiry, Mr. Ruprecht?

MR. RUPRECHT: Your, Honor, I really thing [sic] that the entire circumstances of what was going on here, the number of entries and exits all may have a bearing on the propriety of what these men were doing there.

THE COURT: After you installed the device in the ceiling, did you then leave?

THE WITNESS: We went outside, connected the wire. Agent Seuder went to the far end of it. Agent McCluan and myself went back in the office and tested it. We talked. And we were in contact with a radio with Agent Seuder outside and he would notify us whether he could hear us talking and then after that we departed.

THE COURT: Did you go back there again before you went back in to remove it?

THE WITNESS: No, sir.

THE COURT: When you removed it what did you do? Did you go in the same way? Tell us what you did.

THE WITNESS: Went in the same window, Agent [35] McCluan and myself entered the building. A quick look-around to make sure again no one was there.

Excerpts of Transcript of Proceedings Dated July 29, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

We didn't, as I recall — we didn't even have to go back into the office because the microphone was in the ceiling above the office space and you could get to it from a loft area out in the large room.

And we removed the microphone, the wire and then departed.

THE COURT: All right.

How long were you in there on that occasion?

THE WITNESS: No more than an hour. Half an hour probably.

THE COURT: Did you say you went in the same way again?

THE WITNESS: Yes.

THE COURT: All right.

That's all I'm going to permit, Mr. Ruprecht, unless you give me an indication of any other lines you want to inquire that I think I might admit.

MR RUPRECHT: Just one or two.

BY MR. RUPRECHT:

Q. Prior to the removal of the listening device, were there any sessions with any members of the U.S. Attorney's office or the Department of Justice Attorneys or Strike Force Attorneys with respect to the manner that [36] you should conduct yourselves while removing the device? A. Not that I recall.

Excerpts of Transcript of Proceedings Dated July 29, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

Q. Was there ever a time when it was necessary to enter that building in order to do anything with that device, either to change its location or to affect it mechanically or electronically so it would transmit in a more satisfactory method? A. No, sir.

Q. Was there specifically on the day before you removed this device any trouble disclosed to you about it and any effort made to correct any problems with the listening device? A. Not that I recall.

MR. RUPRECHT: That's all I have.

THE COURT: All right.

You may step down.

(Witness excused.)

THE COURT: Let me see counsel.

(A discussion is held off the record.)

THE COURT: There has been submitted the affidavits of the other agents who were on the assignment with the agent who has testified.

Can you represent to me, Mr. Deichert, that based on conversation that you have had with them and based on examination of their affidavits that they, if called, [37] would testify substantially, at least, as this agent has?

MR. DEICHERT: Yes, sir.

THE COURT: All right.

Excerpts of Transcript of Proceedings Dated July 29, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

I'm not going to then permit the calling of the other agents.

Now, you indicated as well, Mr. Ruprecht, that you had in mind the possibility of calling Mr. Deichert to examine him on why certain information was not brought to my attention. It was clear that it was not, that is the method of breaking, right?

MR. RUPRECHT: That's correct, Your Honor. And I will withdraw that —

THE COURT: All right.

Now, what else is left then?

MR. RUPRECHT: Just this. I intended to put Mr. Dalia very briefly on the stand merely to testify to the existence of some breaks and entry during the period of time that we are concerned with and specifically a break-in that occurred the night before the alleged removal of the —

THE COURT: Would you cross-examine him on that? What would you have to cross-examine him on?

MR. DEICHERT: He already has it in an affidavit form. If he wants —

THE COURT: You're willing to accept it in affidavit form?

[38] MR. DEICHERT: Yes.

THE COURT: Do it that way.

MR. RUPRECHT: Fine.

Excerpts of Transcript of Proceedings Dated July 29, 1976 before Honorable Frederick B. Lacey, U.S.D.J.

THE COURT: Because —

MR. RUPRECHT: I will.

THE COURT: I don't see any need to cross-examine unless you do.

MR. DEICHERT: No, sir.

MR. RUPRECHT: Thank you very much, your Honor.

THE COURT: All right.

You've got an assignment in the other area, gentlemen.

I think what you might do is submit any supplementals on this break-in that you want to submit. I'll have briefs from both sides. It's an interesting issue. And develop any case law you have for me and get it to me as soon as you can.

MR. RUPRECHT: Very fine.

THE COURT: We have left just the one aspect.

MR. DEICHERT: There was a minimization argument as well today.

THE COURT: I will not hear that today. I think what I'm going to do is decide that on the papers. But you can work on your other assignment I gave you.

MR. RUPRECHT: Yes, Judge.

[39] MR. DEICHERT: Thank you, your Honor.

THE COURT: Thank you, gentlemen.

AFFIDAVIT OF LAWRENCE DALIA DATED MAY 24, 1976

STATE OF NEW JERSEY)
COUNTY OF ESSEX)SS.

LAWRENCE DALIA, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the named Defendant in this matter and am generally familiar with the allegations made by the Government herein.

2. It is my understanding that the telephones at my place of business, 1105 W. St. Georges Avenue, Linden, New Jersey were tapped by the Federal Bureau of Investigation between March 15 and May 16, 1973.

3. It is also my understanding that an electronic eavesdropping device was installed in my office at the above address on or about April 5, 1973, and that the device was located above my desk in that office.

4. To the best of my knowledge it would be impossible to install such a device in that location without forcibly gaining access to the building.

5. On at least four (4) occasions between February and May, 1973 my place of business was forcibly broken into and entered at night, and only during the last break-in was anything taken.

6. During the time that my business was located at the above address I leased the premises from the owner, one Benjamin Aruda, who owned and occupied that building located

Affidavit of Lawrence Dalia Dated May 24, 1976

directly to the west of my building, and whose business address was also 1105 W. St. Georges Avenue, Linden, New Jersey.

s/ Lawrence Dalia
LAWRENCE DALIA

Sworn and subscribed before me
this 24th day of May, 1976.

s/ Robert A. Giegerich, Jr.
ROBERT A. GIEGERICH, JR., ESQ.

LINDEN POLICE REPORT DATED MAY 15, 1973 ATTACHED TO FOREGOING AFFIDAVIT

POLICE DEPARTMENT
LINDEN, NEW JERSEY

OFFENSE REPORT

Complainant — MR. JEFFREY DALIA B.F. #64187

Address — 1105 W. ST. GEORGE AVE. LINDEN
Phone 486-6433

Offense — B. & E. Reported by — MRS. HAMILTON

Address — 1105 W. ST. GEORGE AVE. CITY

Place of Occurrence — PRECISE PACKAGING 1105 W. ST. GEORGE AVE. District # 1

Report Received by — LT. TRATULIS at 9:09 A.M. Date — MAY 15, 1973

Date and Time Offense Committed BET. 10:30 PM 5/14 & 7 AM 5/15/73 How Reported — PHONE

Officers Assigned — LISA

Remarks — REPORT OF A B. & E.

Report of Office (State Fully Circumstances of Investigation)

9:09 A.M.
May 15, 1973

Linden Police Report Dated May 15, 1973 Attached to Foregoing Affidavit

Detailed by Lt. Tratulis to 1105 W. St. George Ave. Precise Packing (486-6433) Report of B. & E.

Upon arrival Jeffrey Dalia (owners son) of 765 Audrey Dr. Rahway (381-6273) stated his building was entered through the bathroom window in rear between 10:30 P.M. 5-14-73 and 7:00 A.M. 5-15-73. Missing from the front office was a cassette player, value $30., and from the shop a Craig Stereo AM-FM 8 Track Model C-60005B value $150. Mr. Dalia said the stereo was installed at 7:00 P.M. on 5-14-73 and suspects someone on the night shift. A clock pluged [sic] in near stereo was pulled out at 2:20 A.M.

ARREST — No

Signed — Louis Lisa Date May- 15 - 73
Investigating Officer

Signed — Lt. Tratulis Date 5-15-73
Commanding Officer

No. 77-1722

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE DALIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1722

LAWRENCE DALIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported. The opinion of the district court (Pet. App. 10a-18a) is reported at 426 F. Supp. 862.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1978. The petition for a writ of certiorari was filed on June 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in executing a valid court order authorizing the interception of oral communications in petitioner's office, law enforcement agents lawfully

entered the office, without separate express judicial authorization, to install the device used to make the interceptions.

2. Whether petitioner's sentence is excessive.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of receipt of goods stolen from an interstate shipment, in violation of 18 U.S.C. 2315, and conspiracy to transport, receive, and possess goods stolen from an interstate shipment, in violation of 18 U.S.C. 371. Concurrent five-year prison terms were imposed on the two counts. The court of appeals affirmed (Pet. App. 1a-8a).

1. The evidence at trial showed that on March 27, 1973, one of a group of fabric thieves asked petitioner if he could store "a load of merchandise" on petitioner's business premises (Tr. 1.64). Petitioner refused this request because three months before he had stored stolen fabric for the same group but had been angered about the way that transaction had been handled and about the fact that he had been paid only $300 to store the stolen property (Tr. 3.140-3.141, 3.167-3.173, 4.57-60, 4.73-4.75). Instead, petitioner arranged for another associate, Joseph Higgins, to store the stolen material, and the two agreed to split the $1500 fee for concealing it (Tr. 3.162-3.163).

On April 3, three men hijacked a Farah Manufacturing Company tractor trailer in Brooklyn, New York. The truck, which was carrying more than 600 rolls of fabric, was unloaded at Higgins' warehouse and then abandoned on Staten Island (Tr. 1.72-1.73, 3.68-3.77, 3.160-3.161, 4.64-4.69). Two days later, FBI agents arrested Higgins and four others while they were loading the rolls of fabric into two U-Haul trucks (Tr. 2.29-2.30, 3.163-3.166).

After petitioner learned of the arrests, he discussed with Higgins moving everything that was not legitimate out of Higgins' warehouse (Tr. 3.183, 3.196), and he advised another associate that "[y]ou can only play with fire so long * * * we'll just have to legit * * * we'll just have to lay off the hot merchandise" (Tr. 3.99-3.100). That night, petitioner was expecting a mailtruck carrying $2.5 million in currency to be hijacked and the currency to be brought to him. When he learned of the arrests, he directed that the hijacking be called off; he later learned that the mailtruck hijacking had been "bad news" (Tr. 3.86, 3.184-3.186).

2. At trial, the government introduced evidence of telephone conversations to which petitioner was a party and also of seven conversations that took place in his office. The telephone conversations were intercepted pursuant to an order entered by the district court on March 14, 1973, and a subsequent order entered on April 5. The admission of those conversations is not challenged here. Petitioner challenges only the admission of seven conversations in his office that were intercepted by a listening device. Those conversations were intercepted pursuant to an order of the district court entered on April 5, 1973. The night that the order was entered, FBI agents secretly entered petitioner's office and installed a listening device with which to make the interceptions (C.A. App. 101).[1]

The interceptions of both wire and oral communications were continued pursuant to a court order of April 27, 1973. On May 16, 1973, all electronic surveillance ended, and FBI agents removed the listening device from petitioner's office. Between April 5 and May 16, no entries into the premises were made by government agents (C.A. App. 102).

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[1] "C.A. App." refers to the joint appendix in the court of appeals.

Prior to trial, petitioner moved to suppress the conversations intercepted by means of the listening device. Following a post-trial evidentiary hearing, the suppression motion was denied (Pet. App. 10a-18a). The district court found that the interception was lawful and that "the safest and most successful method of accomplishing the installation of the [device] was through breaking and entering the premises in question" (Pet. App. 17a). The court further concluded that once the court had found that there was probable cause to support the interception, "implicit in the court's order is concomitant authorization for agents to covertly enter the premises in question and install the necessary equipment" (Pet. App. 18a). Accordingly, the court concluded that it was not necessary under the circumstances of this case for the government to obtain explicit judicial approval for the entry (*ibid.*).

The court of appeals affirmed, noting that Judge Lacey, the judge who had both authorized the interception and tried the case, had "found that in this case a surreptitious entry was within contemplation" when the interception was authorized (Pet. App. 6a-7a). The court stated that it would not adopt a rule that specific authorization for an entry to install a listening device is never required, but it held that in this case, where the entry was contemplated by the issuing judge, where it was supported by probable cause and executed in a reasonable fashion, and where it was the most effective means for installing the listening device, separate judicial authorization for the entry would not be required (Pet. App. 7a).

ARGUMENT

1. Petitioner contends (Pet. 7-14) that the surreptitious entry into his office to install a court-authorized listening device violated his Fourth Amendment rights because the

entry was not separately and explicitly authorized by the district court. This Court recently declined to review a similar contention in *Vigorito, et al.* v. *United States*, certiorari denied, Nos. 77-1002, 77-1003, 77-1004, 77-6026, 77-6035, and 77-6165, May 15, 1978, and, for the reasons set out in our brief in opposition in that case, we submit that review should likewise be denied here.[2]

As we argued in our brief in opposition in *Vigorito* and as the district court found in this case, oral communications are normally intercepted by placing a listening device within the premises in which the interceptions are to occur. Thus, as the district court also found, the secret entry to install the listening device was implicitly authorized by the court order approving the interceptions at petitioner's office. The entry thus did not violate petitioner's rights under either the Fourth Amendment or Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

While two other circuits have announced divergent views on the issue presented by this case, both decisions arose in a context different from that presented here and in *United States* v. *Scafidi*, 564 F. 2d 633 (C.A. 2), certiorari denied *sub nom. Vigorito* v. *United States*, Nos. 77-1002 *et al.*, May 15, 1978. The decision of the District of Columbia Circuit in *United States* v. *Ford*, 553 F. 2d 146, involved a re-entry to repair a listening device. The court there held that the district court had improperly delegated to government agents the right to make re-entries in any number and manner without any showing of the necessity for such broad authorization. The Fourth Circuit's decision in *Application of United States*, 563 F. 2d 637, arose prior to any interceptions and held only that the government must establish a "paramount" or "compelling" need to justify judicial authorization of a surreptitious entry to install a listening device. Thus, while

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[2]We are sending petitioner a copy of our brief in opposition in *Vigorito*.

both opinions do contain language suggesting that those courts would not agree with the subsequent decisions of the Second and Third Circuits in *Scafidi* and the instant case, respectively, there is no actual conflict between the holdings in *Ford* and *Application of United States* and the holding in the instant case.

Moreover, as we noted in our brief in opposition in *Vigorito* (pp. 18-19), the federal government has adopted a policy of seeking express judicial approval prior to undertaking any entry or re-entry to install or maintain a court-authorized electronic listening device. Accordingly, we do not anticipate that this issue will be of sufficient continuing importance to require resolution by this Court.

Indeed, there is even less reason for review in this case than there was in *Vigorito*. There, FBI agents entered the premises under surveillance not only to install and remove the listening devices, but also to repair and move the devices. These additional entries, while essential to the proper execution of the interceptions in that case, are not required in every case and may arguably be outside the contemplation of the issuing judge at the time surveillance is approved. In this case, by contrast, the single surreptitious entry required to install the listening device was contemplated by the district court when the interceptions were authorized (Pet. App. 6a).[3]

Finally, even assuming that the entry into petitioner's office was unlawful, the error in the introduction of evidence derived from the interceptions was harmless. The evidence most damaging to petitioner consisted of the

[3]While most of the petitioners in *Vigorito* lacked standing to contest the validity of the surveillance-related entries, one of the petitioners, James Napoli, Sr., clearly had standing to raise the issue.

testimony of eye-witnesses, including co-conspirator Higgins, and telephone conversations overheard by means of wire interceptions that involved no entries into petitioner's office. The oral interceptions were not initiated until after the Farah truck was hijacked and Higgins and his associates were arrested. The subsequent oral interceptions produced only evidence of petitioner's concern about the possible discovery of other stolen merchandise and his efforts to prevent the disclosure of his role in the illegal scheme. Under these circumstances, there can be little doubt that the jury's verdict would have been the same even if the evidence derived from the oral interceptions had been excluded. See *Milton* v. *Wainwright*, 407 U.S. 371; *Chapman* v. *California*, 386 U.S. 18.

2. Petitioner further contends (Pet. 15-16) that the sentence imposed by the district court was too harsh. The short answer to this claim is that the sentence was within the statutory limits and therefore not subject to appellate review. See *Dorszynski* v. *United States*, 418 U.S. 424, 440-441; *Gore* v. *United States*, 357 U.S. 386, 393.

Neither *Woosley* v. *United States*, 478 F. 2d 139 (C.A. 8), nor *United States* v. *Robin*, 545 F. 2d 775 (C.A. 2), holds, as petitioner suggests (Pet. 16), that a sentence within statutory limits may be reviewed as unduly harsh in light of the nature of the offense. In *Woosley*, the trial judge followed a mechanical approach of sentencing all defendants convicted of refusing induction into the armed forces to the statutory maximum and therefore failed to exercise his discretion in that class of cases. In *Robin*, the defendant was denied a fair opportunity to rebut government evidence, unrelated to the heroin conviction for which sentence was being imposed, that the defendant was a major heroin trafficker. Thus, both cases involved

infirmities in the process by which sentence was imposed, not review of the length of the sentence. See *Dorszynski* v. *United States, supra,* 418 U.S. at 443.

In any event, petitioner's contention that he played a "limited" role in the offenses for which he was convicted is belied by the record, which shows that, as the district judge stated at sentencing, "Mr. Dalia played a very important, very significant role in the matters that are subject to this conviction" (C.A. App. 137).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys.

JULY 1978.

DOJ-1978-07

In The

Supreme Court of the United States

October Term, 1978

No. 77-1722

LAWRENCE DALIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petition for Certiorari Filed June 2, 1978 Certiorari Granted October 2, 1978

BRIEF FOR PETITIONER

LOUIS RUPRECHT
Attorney for Petitioner
1180 Raymond Boulevard
Newark, New Jersey 07102
(201) 624-6112

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

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Supreme Court of the United States

October Term, 1978

No. 77-1722

LAWRENCE DALIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

OPINIONS BELOW

The Court of Appeals for the Third Circuit filed an opinion on May 3, 1978. That opinion appears in the appendix to the petition for writ of certiorari filed in this cause. The opinion of the Third Circuit is officially reported as *United States v. Dalia,* 575 F. 2d 1345. The opinion of the United States District Court for the District of New Jersey was filed on January 11, 1977 and also appears in the appendix to the petition for writ of certiorari. The trial court opinion is officially reported as *United States v. Dalia,* 426 F. Supp. 862.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 3, 1978. A petition for writ of certiorari was timely filed with the United States Supreme Court and granted on October 2, 1978. Jurisdiction of the United States Supreme Court is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment IV

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

QUESTION PRESENTED

May government agents commit an otherwise illegal breaking and entry in order to install, maintain and remove electronic listening devices when lawful authority to intercept oral communications has been granted pursuant to 18 U.S.C. §2510 *et seq.*, but when no authority to commit a breaking and entry has been sought or obtained and the supervising court has not been advised of the manner of the proposed entry of installation?

STATEMENT OF THE CASE

Petitioner Lawrence Dalia was indicted on November 6, 1975 with a co-defendant, Daniel Rizzo, in a five count indictment.

Count One charged the defendants with conspiring with five other persons to transport and possess goods stolen in interstate commerce in March, 1973. The statutory reference was to the general conspiracy charge found in 18 U.S.C. §371. Count Two charged the two named defendants and the five unnamed co-conspirators with robbing an interstate truck shipment in violation of 18 U.S.C. §2 and §1951. Count Three charged the two named defendants and four of the previously unindicted co-conspirators with transporting stolen goods in interstate commerce in violation of 18 U.S.C. §2 and §2314. Count Four again charged the two defendants and the five previously named unindicted co-conspirators with receiving goods which had been stolen while engaged in interstate commerce in violation of 18 U.S.C. §2 and §2315. The last count charged both defendants and the other five individuals with possessing goods which had been stolen in interstate commerce in violation of 18 U.S.C. §659.

Immediately prior to commencement of trial, the co-defendant Daniel Rizzo, entered a plea of guilty. The five persons named in the indictment as unindicted co-conspirators had previously been prosecuted for their involvement in the alleged criminal transaction and had all pleaded guilty approximately two years before petitioner's trial.

Petitioner's trial was held in the District of New Jersey before Honorable Frederick B. Lacey, J.D.C. on June 15, 16, 17 and 18, 1976. The trial judge granted a motion for judgment of acquittal on Counts Two and Three at the conclusion of the Government's case (R4.131). Extensive redaction of the indictment was accomplished to comport with trial proofs and consequent rulings. On June 18, 1976, the jury returned a verdict of guilty on Counts One and Four. The jury acquitted petitioner on possessory Count Five.

Extensive electronic surveillance had preceded the indictment and appropriate motions to suppress had been made. However, the court determined to decide these motions at the

conclusion of the trial. Consequently, post-trial evidentiary hearings were conducted resulting in the denial of petitioner's motions. On January 24, 1977, petitioner was sentenced to a term of imprisonment of five years on Count One. Another five year sentence was imposed on Count Four to run concurrently with the term sentence imposed on Count One.

As a result of pre-trial discovery and evidence adduced at post-trial hearings, it was developed that on March 14, 1973, Judge Lacey had issued an order authorizing the interception of wire communication emanating from petitioner's business premises in Linden, New Jersey. The order provided that two separate telephones were to be the subject of the interception.

After the two telephones had been tapped for 20 days, the Government applied again to Judge Lacey for an order permitting continued electronic surveillance. This time, however, the Government sought and was granted the right to intercept both telephone conversations, as well as oral communications. This second order was granted on April 5, 1973 and recited the same two telephones which had been subjected previously to interception. The order also found,

> "(e) There is probable cause to believe that the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, and situated in the northwesterly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey, has been used, and is being used by Larry Dalia and others as yet unknown in connection with the commission of the above-described offenses." (A7).

The order then provided that the previously mentioned telephones could be intercepted again. The order went on to state that the Government could,

> "(b) Intercept oral communications of Larry Dalia, and others as yet unknown, concerning the above-described offenses at the business office of Larry Dalia . . ." (A8).

This order, as was the first, was a 20-day order. It provided that New Jersey Bell Telephone Company should offer whatever assistance was necessary to provide for the interception of the wire communications, however, it made no provision for the manner in which oral communications were to be intercepted.

In accordance with the authorization of the foregoing order, the two business telephones of petitioner were tapped for another 20 days. Additionally, for 20 days his office was "bugged" and all conversations taking place therein were recorded.

Upon the expiration of the second order, the Government again applied to Judge Lacey to continue its eavesdropping. On April 27, 1973, Judge Lacey authorized interception of wire and oral communications in a manner identical to that which had been done on April 5, 1973. This third order again was for 20 days. It applied to the same two telephones and to oral communications emanating from petitioner's office. Pursuant to that order, the Government intercepted all telephone communications from the two business telephones for an additional 20 days and all conversations conducted in petitioner's office for an additional 20 days (A11-15).

When the indictment came on for trial before Judge Lacey on June 15, 1976, the court first alluded to petitioner's pending motion to suppress evidence based upon the method of electronic surveillance. The court requested counsel to set out their respective positions and then asked the Government attorney whether he had instructed the law enforcement officers as to how they were to effectuate the order authorizing interception of oral communications. The relevant passage is instructive:

"THE COURT: . . . was there any discussion between you and the agent on the one hand and me on the other as to how this order was going to be carried out?

MR. DEICHERT: No.

THE COURT: All right. That was one question that you wanted asked.

MR. RUPRECHT: That's correct Your Honor.

THE COURT: Now, before we get into the affidavits — and I'll deal with that in a moment — I think your record also ought to reflect you have raised this as another issue. I think your record also reflected a response to that issue.

My recollection, again, is that I gave no limiting instructions on how my order was to be carried out.

MR. DEICHERT: That's correct.

THE COURT: And my recollection further is that I did not explore afterwards how my order was carried out. Is that correct? In terms of how the entry was made.

MR. DEICHERT: Yes, that's correct as well." (A21-22).

At trial, the Government introduced several tape recordings of intercepted telephone conversations as well as eight separate tape recorded office conversations which had been overheard by the electronic listening device installed pursuant to the second and third orders.

On July 29, 1976, the court directed counsel to appear for a post-trial hearing on petitioner's pending motions to suppress evidence. Petitioner had filed an affidavit (A45) establishing his belief that any electronic surveillance in his office might have resulted from a break and entry. The Government had three FBI agents in court who had apparently participated in the break-in to install listening devices. Agent Neil E. Price was called by the Government as its first witness. He said he had made an entry through a side window of petitioner's place of business on April 5, 1973. He said that he did this in order to install a listening device in the ceiling of petitioner's office. While on the premises, he denied taking anything or speaking to anyone about anything he had seen present inside the premises. He admitted to reentering the building on May 16, 1973 to remove the installed device. He said that three agents entered the building on April 5, 1973 and two entered on May 16, 1973 (A29-42).

On cross-examination, Agent Price testified he did not prepare any reports dealing with his activities, but the court would not permit him to answer why reports had not been made. The court would not permit interrogation as to what position Agent Price's superior held who directed the break-in (A34). The agent testified that no one gave him any instruction whatsoever as to the method or manner of performing his task. He said that he did not prepare any documents for submission to the court dealing with the break-in. He admitted there had been no briefing sessions or instructions by any members of the Department of Justice or United States Attorney's Office respecting the manner in which they should conduct themselves while on the premises (A35).

While on the premises, the agent said he looked throughout petitioner's entire building for "safety" reasons. He testified that he was in petitioner's office building for two or three hours and in petitioner's personal office "maybe a half an hour total." (A37, 39).

The court indicated it considered the factual issues to be extremely narrow and continually restricted the cross-examination of Agent Price. At the conclusion of the agent's testimony, the court inquired of the Government attorney whether the other two FBI agents who were on hand, "if called, would testify substantially, at least, as this agent has." Upon the Government attorney's representation that they would, the court said, "I'm not going to then permit the calling of the other agents." (A43).

At the conclusion of the hearing, the court reminded counsel that "the method of breaking . . . was not brought to my attention." (A43).

Defense counsel then noted that petitioner would take the stand to testify that there were several "breaks and entry during the period of time that we are concerned with and specifically a break-in that occurred the night before the alleged removal of the — ." (A43). The Government attorney agreed that this was already in the case through affidavit proof and he did not wish to cross-examine on it, therefore, no further testimony was adduced (A44).

SUMMARY OF ARGUMENT

Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §2510-§2520 does not authorize a court to permit law enforcement officers to commit otherwise illegal breakings and entries in order to install electronic listening devices. The legislative history of the act fails to reveal such an intention. It is not unduly weakening the tools of law enforcement officers to refuse them the right to commit surreptitious entries without explicit legislative approval.

In the event it is found that the Third Circuit correctly interpreted Title III, then such an interpretation is violative of the Fourth Amendment of the United States Constitution. A

statute which permits law enforcement officers to conduct breakings and entries is unconstitutional because such an activity is necessarily unreasonable.

If it is assumed that Title III may constitutionally be interpreted as authorizing a court to empower law enforcement officers to break and enter in order to install listening devices, then the order and search in this case were violative of the Fourth Amendment. The order was overbroad in failing to give any direction to the law enforcement officers. Too much discretion was given to the officers in conducting their search and no independent hearing and order existed dealing with the specific breakings and entries which were conducted.

ARGUMENT

I.

A court has no statutory power to permit a breaking and entry in order to install electronic eavesdropping devices nor is a lawful order authorizing interception of oral communications an implicit authorization to commit a break-in.

Since 1976 several cases have considered whether federal agents may conduct surreptitious entries to install, maintain, position or remove electronic listening devices pursuant to a Title III[1] order. The decisions are in hopeless disarray with no common thread of reasoning in their fabric. A brief review of the cases is necessary to place the issue in proper perspective.

The first case discussing the issue was *United States v. Agrusa*, 541 F. 2d 690 (8 Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977). There,

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1. "Title III" refers to Title III of the Omnibus Control and Safe Streets Act of 1968, 18 U.S.C. §2510, *et seq.*

> "The order authorized the Government 'to make secret and, if necessary, forcible entry any time of day or night which is least likely to jeopardize the security of this investigation, upon the premises . . . in order to install and subsequently remove whatever electronic equipment is necessary to conduct the interception of oral communications in the business office of said premises.'" 541 F. 2d at 693.

Upon appeal, the Eighth Circuit held that such an order and entry was not violative of the Fourth Amendment. The court then apparently assumed statutory authority of the court to permit a breaking and entry; not by reading it implicitly into Title III but by referring to 18 U.S.C.§3109[2] as a codification of a law enforcement officer's common law right to enter under exigent circumstances. The court stressed that the premises was an unoccupied commercial building in holding that sufficient exigent circumstances existed. The analysis concluded by stating:

> "We hold that law enforcement officials may, pursuant to express court authorization to do so, forcibly and without knock or announcement break and enter business premises which are vacant at the time of entry in order to install an electronic surveillance device, provided the surveillance activity is itself pursuant to court authorization, based on probable cause and otherwise in compliance with Title III. We

2. 18 U.S.C. §3109 reads:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

> express no view on the result which obtains when one or more of these factual variants is altered." 541 F. 2d at 701.

There was a strong dissent from Circuit Judge Lay who noted that the exigencies sufficient to permit a breaking and entry had not been demonstrated. He then noted that, presumably on Fourth Amendment grounds, he would reverse because,

> "[r]ather then draw artificial distinctions, I would hold searches such as this to be unreasonable *per se*." 541 F. 2d at 704.

Thereafter the Eighth Circuit was petitioned to rehear the matter, *en banc*. By an evenly divided vote, the petition was denied, however, the four voting for rehearing expressed "grave doubts" on constitutional grounds that *any* order authorizing a break and entry would be valid and,

> ". . . we believe that the Fourth Amendment does not permit government agents to break into and enter private property to spy out evidence which might develop in the future by planting an electronic bug in such premises." *United States v. Agrusa, supra, en banc*, 541 F. 2d 704.

The second case was *United States v. Ford*, 414 F. Supp. 879 (D.D.C. 1976), *aff'd*, 553 F. 2d 146 (D.C. Cir. 1977). There, federal agents secured an order to electronically surveil commercial premises.[3] The agents informed the issuing court that they intended to gain entry to install a listening device by evacuating the building through a bomb scare. The court, in its order, permited the agents to,

3. The interception and electronic surveillance was conducted pursuant to 23 D.C. Code §§541-556 (1973) which is practically identical to Title III.

> "Enter and re-enter . . . for the purpose of installing, maintaining and removing the electronic eavesdropping devices. Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry or entry and re-entry by ruse and stratagem." 553 F. 2d at 149.

The circuit court held that,

> "When police seek to invade, surreptitiously and without consent, a protected premises to install, maintain or remove electronic surveillance devices, prior judicial authorization in the form of a valid warrant authorizing that invasion must be obtained." 553 F. 2d at 165.

The district court had concluded that while Title III did not expressly empower officers to break and enter, the Legislature had intended this result. *United States v. Ford*, 414 F. Supp. at 883. The circuit court dealt entirely with Fourth Amendment considerations in striking down the court order as facially overbroad. It did not resolve the issues of whether Title III *in fact* permitted break-ins[4] or whether a break-in could *ever* withstand constitutional challenge.[5]

4. "Though we need not reach in this case the issue whether covert entry may be authorized by a court order, we note that the statutory provisions could be read to apply only to the kind of devices which are technically trespassory under the doctrine of *Silverman v. United States*, 365 U.S. 505 (1961), but do not require covert or surreptitious entry for installation." 553 F. 2d at 151, footnote 20.

5. "We do not decide when, if ever, surreptitious entries are reasonable within the Fourth Amendment . . . . If police are to be permitted to enter private premises to conceal eavesdropping devices — a question we leave unresolved — they at least must be required to proceed in accordance with the authorization of a warrant narrowly tailored to the demonstrated demands of the situation." 553 F. 2d at 170.

In *Application of the United States*, 563 F. 2d 637 (4 Cir. 1977) the circuit court overturned a district court which had subjected an application for surreptitious entry to a scrutiny which demanded the Government show a "paramount interest" before authorizing such manner of entry. It was held by the Fourth Circuit that Title III contemplated surreptitious entries but the supervising judge had to make independent findings of need to satisfy the Fourth Amendment. The court stated:

> "[p]ermission to surreptitiously enter private premises cannot, therefore, be implied from a valid Title III order sanctioning only the interception of oral communications." 563 F. 2d at 644.

The overseeing court had to sanction, "such an entry in a manner that does not offend the substantive commands of the Fourth Amendment." *Ibid.*

There next followed two cases which stand for the proposition that Title III implicitly empowers law enforcement officers to conduct discretionary breakings and entries if armed with an order authorizing interception of oral communications. In *United States v. Scafidi*, 564 F. 2d 633 (2 Cir. 1977), *cert. denied sub. nom., Vigorito v. United States*, 435 U.S. 903 (1978) the court held that an order authorizing electronic surveillance carries,

> ". . . its own authority to make reasonable entry as may be necessary to effect the seizure of the conversation." 564 F. 2d at 640.

The case at bar was decided by the Third Circuit in a brief opinion [*United States v. Dalia*, 575 F. 2d 1344 (3 Cir. 1978)], which relied primarily upon *United States v. Scafidi, supra*, and the district court opinion in *Dalia*. The holding was summarized in the following fashion:

> "We agree with Judge Lacey that an order authorizing the interception of oral communications does not require explicit authorization for a forcible surreptitious entry and we affirm." 575 F. 2d at 1345.

Within recent weeks, two more circuits have dealt with the issue presented here. In *United States v. Finazzo*, ____ F. 2d ____ (6 Cir. decided August 28, 1978), the court refused to accept the premise that Title III authorized breakings and entries:

> "In some circumstances, the installation of an electronic bug may not be possible without a forcible breaking and entering of the suspect's premises, but that does not imply that the power to break and enter is subsumed in the warrant to seize the words. The breaking and entering aggravates the search, and it intrudes upon property and privacy interests not weighed in the statutory scheme. Interests which have independent social value unrelated to confidential speech. We are not inclined to give the Government the right by implication to intrude upon these interests by conducting official break-ins, especially when the purpose is secretly to monitor and record private conversations, a dangerous power, otherwise carefully limited and defined by statute." (Slip opinion at 9.)

Even more recently, the Ninth Circuit came to a similar conclusion in *United States v. Santora*, ____ F. 2d ____ (9 Cir. decided October 6, 1978). In an exhaustive study of pertinent legislative history (slip opinion at 8-18) Judge Hufstedler concluded:

> "We agree with the Government that Congress 'was aware of the entry problem.' But we disagree that from that awareness Congress chose to grant authority to permit either break-ins or technical trespasses to install bugging devices by implications derived from its silence." (Slip opinion at 15.)

The threshold question, then, that must be addressed on this appeal is whether there exists statutory authority in Title III to permit a breaking and entry to install listening devices. If none exists, then the interception of petitioner's office conversations was clearly unlawful. Since the overseeing judge was not apprised of the Government's intentions and never specifically authorized the entries, it is unnecessary to consider the argument of the Government, made and rejected in *United States v. Finazzo, supra,*

> "... that federal judges have inherent or common law power under the Fourth Amendment, independent of any statutory authority, to permit break-ins in the execution of an otherwise valid eavesdrop warrant." (Slip opinion at 10.)

Further, since the Government, in its brief below, did not argue that law enforcement officers had an inherent power to break and enter, nor did the district court or Third Circuit so hold, petitioner respectfully expresses his intention to answer such an argument, if made, by way of reply brief.[6]

When the Omnibus Crime Control and Safe Streets Act of 1968 was enacted containing Title III dealing with wiretapping

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6. The only case in which this argument has been made by the Government is *United States v. Finazzo, supra,* at slip opinion pp. 16-22. The majority in *United States v. Agrusa, supra,* stated that it based its affirmance upon the warrant issued by the district court to conduct a surreptitious entry but did not discuss the source of the court's power to issue the warrant.

and electronic surveillance, the Act set out a detailed procedure under which law enforcement officers could, in a most limited fashion, wiretap and conduct electronic surveillance. Title III has been referred to as a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard v. United States*, 408 U.S. 41, 46 (1972).

Various portions of Title III regulate the circumstances for which an order permitting wiretapping and electronic surveillance may be resorted. Only specified crimes may be the subject of electronic surveillance. 18 U.S.C. §2516(1)(a) to (g). The prosecutorial decision to apply for an order permitting wiretapping or electronic surveillance must come from the highest levels of the Department of Justice. 18 U.S.C. §2516(1). There are provisions for minimization of the number and extent of overheard conversations and the interception must end upon the achievement of its objective but in no case beyond 30 days. 18 U.S.C. §2518(5). Electronic surveillance may not be utilized unless the Government is able to show that conventional investigatory methods are inappropriate. 18 U.S.C. §2518(1)(c). Not only must a substantial showing of probable cause be made that incriminatory information will be forthcoming but the suspected individuals must be identified as well as a description of the type of communications which are sought to be intercepted. 18 U.S.C. §2518(1)(b). There are detailed requirements with respect to inventorying and sealing the results of the interceptions as well as notification to the subjects. 18 U.S.C. §2518(8)(a) to (d). The matter has been considered so sensitive that judges are obliged to file reports with the Administrative Office of the United States Courts of all important details with respect to applications and orders for electronic surveillance. 18 U.S.C. §2519(1). Further, in the first month of each year, high officials of the Department of Justice are obliged to report to the Administrative Office of the United States Courts with respect to their utilization of Title III. 18 U.S.C. §2519(2).

It is noteworthy that at the time Title III was enacted, the Congress inserted certain findings into the body of the statute. 18 U.S.C. §801(d) provides that:

> "To safeguard the privacy of innocent persons, the interception of all wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court."

The foregoing recitation serves as a reminder of the care the Congress gave to the enactment of a statute which carries with it an inherent capacity for abuse. Despite the required detailed overseeing of law enforcement officers by the courts when Title III is resorted to as a investigative tool, there is absolutely nothing in the Act which authorizes government agents to conduct otherwise illegal breakings and entries to effectuate its purpose. Nowhere in Title III may there be found authorization for a court to permit an otherwise illegal breaking and entry.

The Third Circuit in its opinion below found that despite the silence of Title III on the issue, there is implicit authorization for surreptitious entries. However, given the extensive protections afforded by Title III, it is inconceivable that legislative authority to commit otherwise illegal breakings and entries may be found simply because there is authority to eavesdrop on conversations.

The legislative history so carefully detailed in *United States v. Santora, supra*, shows there is very little that can be said to imply a legislative intent to authorize breakings and entries. Congress was presumptively aware of *Silverman v. United States*, 365 U.S. 505 (1961). There it had been held that a

trespassory eavesdropping violated the Fourth Amendment to the Constitution. One could hardly conceive that *Silverman*, was "overruled" by Title III through implication.

The argument presented by the Fourth Circuit in support of its holding in *Application of the United States, supra,* was that authority to break and enter must be implied lest criminals find a "loophole" in the law. This argument is founded upon the supposition that electronic surveillance may be conducted only by wiretapping or breakings and entries. However, it is quite possible for electronic surveillance to take place without a breaking and entry. In *Silverman v. United States, supra,* the electronic surveillance was trespassory but not the product of a breaking and entry. There, a spike microphone was driven through a wall into a heating duct enabling law enforcement officers to pick up conversations from an adjoining apartment. In *Goldman v. United States,* 316 U.S. 129 (1942) electronic surveillance was accomplished by placing a "detectophone" against a wall. Many other forms of electronic surveillance, not necessitating breakings and entries, can be contemplated. For example, parabolic microphones pick up conversations at great distances. Informants, lawfully upon the premises, can secrete transmittors or leave tape recorders behind. Consequently, it does not follow as a matter of logical necessity that the Legislature's permission to conduct electronic surveillance also implies its permission to commit breakings and entries. The far more likely explanation for the absence of any explicit authorization in Title III is that there was no consensus to permit breakings and entries. The utter absence of any legislative history that can be pointed to indicating a conscious decision to permit surreptitious entries is powerful evidence that Congress did not intend to confer such authority upon law enforcement officers or the courts. Certainly an issue with such enormous public interest and political consequences would have been the subject of specific debate had it been the intent to confer such authority through Title III. It does not do an injustice to Title

III or the Congress, nor does it create an intolerable burden upon law enforcement officers to interpret Title III as not an authorization to break and enter in order to effect electronic surveillance.

II.

It is a violation of the Fourth Amendment to permit law enforcement officers to conduct surreptitious entries under the authority of Title III.

If it should be found that Title III, by implication, authorizes a court to permit law enforcement officers to commit breakings and entries, then petitioner urges that such an interpretation is violative of the Fourth Amendment to the United States Constitution.

In referring to trespassory intrusions to effect electronic surveillance, it was held in *Silverman v. United States,* 365 U.S. 505, 509-51 (1961),

> "Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights."

In *Irvine v. California,* 347 U.S. 128 (1954), police officers broke into the petitioner's home to install and reposition eavesdropping devices. The plurality opinion read in pertinent part,

> "Each of these repeated entries of petitioner's home without a search warrant or other process was a trespass, and probably a burglary, for which any unofficial person should be, and

> probably would be, severely punished. . . . That officers of the law would break and enter a home, secrete such a device, even in a bedroom and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principle declared by the Fourth Amendment."

As previously noted in Point I, *United States v. Ford, supra, United States v. Santora, supra,* and an equally divided panel in *United States v. Agrusa, supra,* mention the troublesome Fourth Amendment problem without expressly ruling upon it. Further, in *United States v. Finazzo, supra,* the Sixth Circuit, after deciding the case on statutory grounds, added,

> "We need not decide whether we agree with the four members of the Eighth Circuit *en banc* court who would hold that break-ins to install eavesdrop devices violate the Fourth Amendment under all circumstances, even if author zed by statute. We need not decide whether such a statute would be constitutional."

The Fourth Amendment protects against unreasonable searches and seizures. It is respectfully submitted that legislative authority for law enforcement officers to commit otherwise illegal breakings and entries into the home or office of a suspect is inherently unreasonable. In *Ker v. California,* 374 U.S. 23 (1963), local officers utilized a passkey to gain entry into the home of Ker who was suspected of possessing narcotics. Ker was arrested on the premises and the officers conducted a search incident to that arrest. Narcotics were found on the premises in the search and were introduced against Ker at trial. A sharply

divided court upheld the conviction on the basis that exigent circumstances justified the officers' failure to give notice of their intention to enter. A state statute existed authorizing an unannounced entry where exigent circumstances such as the imminent destruction of evidence existed. The majority held:

> "Here, justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief he might well have been expecting the police. We therefore hold that in the particular circumstances of this case, the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment."

An analysis which finds the Fourth Amendment not violated by the circumstances in *Ker* might well find a violation where officers are authorized to commit what would otherwise be considered a breaking and entry. The circumstances of this case are more aggravated than in *Ker.* Here, law enforcement officers, according to the Third Circuit, are permitted to enter into a suspect's premises and wander about for "safety" reasons. The officers are permitted to stay on the premises for an indefinite period of time, presumably in their own discretion, to do whatever they believe is necessary to effect electronic surveillance. The number of entries, the time, the number of persons authorized to go upon the premises all are within the discretion of the law enforcement officers.

The majority in *Ker v. California, supra,* went on to state:

> "Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its

> recognition of individual freedom. That safeguard has been declared to be 'as of the very essence of constitutional liberty' the guarantee of which 'is as important and imperative as are the guarantees of the other fundamental rights of the individual citizen. . . .' While the language of the amendment is 'general', it forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made."

The four members joining in the opinion to affirm *Ker,* found that the exigent circumstances surrounding the arrest and entry made the consequent search not unreasonable. However, the four dissenters in *Ker* held that an unannounced police intrusion into a private home is violative of the Fourth Amendment,

> "[e]xcept (1) where the persons within already know of the officer's authority and purpose or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock on the door) are then engaged in an activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted." 374 U.S. at 47.

The opinion of the Ninth Circuit in *United States v. Santora, supra,* demonstrates the awareness of the Congress which enacted Title III of the leading cases of *Berger v. New York,* 388 U.S. 41 (1967) and *Katz v. United States,* 389 U.S. 347 (1967). In fact, Title III was, in large measure, a careful response to the *Berger* and *Katz* holdings. *See, United States v. United States District Court,* 407 U.S. 297, 307 (1972). Thus, it is not unreasonable to look to these cases as an interpretation of

Title III and also to refer to them to see if the Third Circuit's interpretation of Title III squares with their holdings.

In *Berger v. New York, supra,* a New York statute authorizing electronic surveillance resulted in the placement of a listening device in the office of one Neyer. On appeal to the United States Supreme Court, the New York statute was found unconstitutional because in the words of the *Berger* court, it

> ". . . permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent changes, than that required when conventional procedures of search and seizure are utilized. . . . In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." 388 U.S. at 60.

According to *Berger,* the barest minimum constitutionally, would be a statutory requirement of exigency. Title III has none. But petitioner's argument goes even further. Few things are more susceptible to abuse than that which the Government seeks to legitimatize in the instant case. One can conceive of few activities by the police more repugnant than the breaking into private premises by law enforcement officers as if common burglars and the consequent unsupervised rummaging around to install, maintain, reposition and remove listening devices.

It is especially interesting to note that in the instant case the officers who entered petitioner's premises pursuant to an order of electronic surveillance did so when they never could have got in with a search warrant. There was nothing in the various government applications for electronic surveillance that would indicate petitioner had any contraband or incriminatory evidence that might be seized under a search warrant. Thus, the intolerable situation arises where officers who could not obtain a

valid search warrant can manage to come upon a suspect's premises, in a totally secret and unsupervised manner, conduct a search for "safety" reasons and then depart. Surely a statute which countenances this activity is violative of the Fourth Amendment prohibiting unreasonable searches.

If the public is to have confidence in its law enforcement officers, they must conduct themselves in a manner which is beyond reproach. While the examination of the one entering officer was unsatisfactory because of the restrictions imposed, his unusual nighttime activities raise numerous questions. The petitioner filed an affidavit and accompanied it with a police report (A47), showing that during the two months he was being subjected to electronic surveillance, his business was entered on numerous occasions. One documented instance was the night after the FBI agent admitted entering the premises. Whether law enforcement officers were responsible for the May 16, 1973 break-in may never be known. However, unnecessary questions and unnecessary suspicions are raised. Confidence in the probity of law enforcement officers demands that they be held to higher standards than permitted by the Third Circuit's interpretation of Title III. The conduct which the Third Circuit permits law enforcement officers to engage in pursuant to Title III is fundamentally unreasonable. It is this unreasonableness which raises the objection to the constitutional level.

III.

Assuming the right of a court to authorize a surreptitious entry to install a listening device pursuant to Title III, such authority was neither applied for, considered nor given and the consequent entry of the law enforcement officers to install listening devices was unlawful.

The warrant in the instant case simply authorized law enforcement officers to intercept conversations in petitioner's office. The Government concedes that the issuing judge was never apprised of the intention of the officers to enter petitioner's premises. If it is assumed that Title III implicitly authorizes surreptitious entry to install listening devices, then the Fourth Amendment requires that such an entry be the specific subject of judicial authorization. In *United States v. Ford, supra,* the court was concerned with an order specifically authorizing officers to break and enter in order to install a listening device. The District of Columbia Circuit Court of Appeals held that the warrant was overbroad. It was the holding of that court that under well-established case law dealing with search and seizure, a warrant must be particular and specific if it is to withstand constitutional attack. Among the failures in that case was the absence of any direction as to the manner in which the entry was to take place, the persons who were to make the entries, the number of entries that would be authorized or the length of time the officers would be permitted to remain on the premises. The court stated,

> "A person whose physical privacy is to be invaded has a right to expect the judicial officer issuing an intercept order will authorize only those entries and those means of entry necessary to satisfy the demonstrative and cognizable needs of the applicant. This is the method by which the magistrate exercises the degree of supervision required by the Fourth Amendment in the

> absence of statutory safeguards. There having been a failure in this regard, we affirm the judgment of the District Court that, given the showing to the District Judge in this case, the failure of the order to limit time, manner or number of entries over a 40-day period made the authorization far too sweeping." (Footnotes omitted) 553 F. 2d at 170.

In the instant case, there was no prior decision by a neutral and detached magistrate that a breaking and entry was required in this case. In *Application of the United States, supra* at 644, the court held that:

> "Permission to surreptitiously enter private premises cannot, therefore, be implied from a valid Title III order sanctioning only the interception of oral communications. . . . With respect to the instant case, this means that even had the district court issued an order of authorization on the basis of its preliminary conclusion that the statute permitted interception of the target conversations, the door would not have been automatically opened for the Government to plant listening devices in the manner proposed.

The district court was thus correct insofar as it subjected the request for authorization and surreptitious entry to separate Fourth Amendment consideration. Since in the absence of exigent circumstances the Fourth Amendment commands compliance with the warrant requirement, we would normally countenance secret entry by federal agents for the purpose of installing, maintaining or removing listening devices only under the following conditions: (1)

> where, as here, the district judge to whom the interception application is made, is apprised of the planned entry; (2) the judge finds, as he did here, that the use of the device in the surreptitious entry incident to its installation and use provides the only effective means available to the Government to conduct its investigation; and (3) only where the judge specifically sanctions such an entry in a manner that does not offend the substantive commands of the Fourth Amendment. Such a requirement is not novel to the law of search and seizure. It also comports with the interception scheme of Title III, since it is apparent that the legislature anticipated meticulous judicial supervision of all aspects of electronic eavesdropping."

Title III is unusual in that the Congress saw fit to insert detailed findings prior to the text of the statute. Among these findings was the following:

> "(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction *and should remain under the control and supervision of the authorizing court.*" (Emphasis supplied.) 18 U.S.C. §801(d).

The control is not only mandated by statute. This control is of constitutional import as *United States v. Ford, supra,* and *Application of the United States, supra,* both show. The control comes about by having the court exercise its independent judgment as to the need for surreptitious entry only after that need has been established under oath. The control is furthered by requiring a particularized warrant directing the officers as to exactly what it is they may do.

In addition to the constitutional and statutory demands that exist to control police officers when engaged in a sensitive invasion of the peoples' rights, there is a control to be exercised by the courts as part of their general supervisory duties over police practices. For example in *Osborn v. United States,* 385 U.S. 323 (1966) law enforcement officers wished to record an anticipated conversation with a suspect believed to be involved with jury tampering. Application was made to the court for specific authorization and after hearing the application and being satisfied of the need, the court did give specific authority to conduct the surveillance. No statute was involved, the case having preceded Title III. In any event, such consentual "overhearing" would not qualify as a "interception" under Title III. Notwithstanding the absence of any statute which would make the proposed surveillance illegal, the district court, as well as the Supreme Court approved the procedure of judicial supervision over such activities.

In dealing with surreptitious entries to install listening devices, the courts are dealing with perhaps the most sensitive area in which law enforcement officers intrude into the life of the public. It is essential that such a grave intrusion so susceptible to abuse be subjected to the most stringent controls. These controls must not be simply minimal constitutional controls dictated by the Fourth Amendment. They should be controls tailored by the courts to meet the specific problem at hand. It is urged that if surreptitious entries are to be countenanced, they be permitted only upon the closest judicial supervision.

The failure of the Government to apprise the supervising court that a break-in was anticipated invalidates the fruits of that unlawful entry. In the case at bar, there was never even an evaluation by "the neutral and detached magistrate" as to the need for surreptitious entry. At no time was there ever any question put to the Government as to its supposed need to conduct a breaking and entry. Never was inquiry made as to why a less intrusive form of surveillance could not have

accomplished the same end. Furthermore, once the agents received their authorization to intercept oral communications, they were left with absolutely no restrictions on how many times they might enter petitioner's premises. There is no way of knowing whether the agents were of the belief that once they were "lawfully" on the premises, they were thereby entitled to conduct a full-scale search. No one had briefed them on their rights, duties or obligations while on petitioner's premises. The total absence of judicial participation and control over this sensitive area demands suppression of the results of the unlawful entry.

CONCLUSION

For the reasons expressed above, it is respectfully urged that the admission into evidence of seven conversations which were the product of an unlawful entry was error. Consequently, the conviction of petitioner should be reversed and the matter remanded to the trial court for a new trial.

Respectfully submitted,

s/ Louis A. Ruprecht
Attorney for Petitioner

No. 77-1722

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE DALIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

WILLIAM C. BRYSON
KENNETH S. GELLER
Assistants to the Solicitor General

JEROME M. FEIT
KATHERINE WINFREE
Attorneys
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1722

LAWRENCE DALIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 575 F.2d 1344. The opinion of the district court (excerpted at Pet. App. 10a-18a) is reported at 426 F. Supp. 862.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a-9a) was entered on May 3, 1978. The petition for

a writ of certiorari was filed on June 2, 1978, and was granted on October 2, 1978, limited to Question One of the petition (Pet. 2). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal law enforcement agents, in executing a valid court order authorizing the interception of oral communications at specified business premises, may enter those premises surreptitiously and without express judicial approval to install the device used to make the authorized interceptions.

STATUTE AND RULE INVOLVED

18 U.S.C. 2518 provides in pertinent part:

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which

or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

Rule 41 of the Federal Rules of Criminal Procedure provides, in pertinent part:

> (b) Property Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits

of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

* * * * *

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of receiving goods stolen from an interstate shipment, in violation of 18 U.S.C. 2315, and of conspiracy to transport, receive, and possess the goods, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-8a).

1. On March 27, 1973, Joseph Palase, a member of a group of fabric thieves, asked petitioner if he could store "a load of merchandise" on petitioner's business premises in Linden, New Jersey (Tr. 1.64-1.65, 2.65-2.69, 2.87-2.88). Petitioner refused this request because on a previous occasion he had been angered about the way the transaction had been handled and about the fact that he had been paid only $300 to store the merchandise (Tr. 3.140-3.141, 3.167-3.172, 4.54-4.60, 4.73-4.75). Instead, petitioner arranged for another associate, Joseph Higgins, to store the stolen goods (Tr. 2.65-2.69, 2.87-2.89, 3.135-3.139, 3.157-3.158). Higgins and petitioner agreed to divide the $1,500 fee they expected to receive for concealing the merchandise (Tr. 2.60-2.62, 3.139, 3.158, 3.162-3.163).

On April 3, 1973, co-defendant Daniel Rizzo and two other men hijacked a Farah Manufacturing Company tractor-trailer in Brooklyn, New York. The truck was carrying 664 rolls of polyester fabric valued at approximately $250,000 (Pet. App. 2a; Tr. 3.68-3.77, 3.88-3.91, 4.64-4.70). Later that day, the fabric was unloaded at Higgins' warehouse in Woodbridge, New Jersey (Tr. 1.70-1.73). The truck was then abandoned on Staten Island (Tr. 1.73, 2.21-2.22). Two days later, FBI agents arrested Higgins, Palase, and three other persons at Higgins' warehouse as

they were loading the stolen rolls of fabric onto two U-Haul trucks (Tr. 1.77-1.88, 1.90-1.91, 2.29-2.30, 3.163-3.166).

2. At trial, the government introduced tape recordings of 13 telephone conversations to which petitioner was a party and eight conversations that took place in his office. The telephone conversations (the admissibility of which is not challenged here) were intercepted pursuant to court orders entered on March 14, 1973, and April 5, 1973.[1] They included the conversation in which petitioner arranged with Higgins to let the fabric thieves store their booty at Higgins' warehouse (Tr. 2.60-2.62), conversations between petitioner and Palase regarding the storage arrangement (Tr. 2.65-2.69, 2.75-2.81, 2.87-2.88, 2.90, 2.92-2.93), and conversations in which petitioner was informed of the arrests and advised others who had not been arrested to "sit tight" and not to use the telephone (Tr. 2.97-2.99, 2.100-2.102).

The recordings of the eight conversations in petitioner's office that were admitted at trial were intercepted pursuant to the court order of April 5, 1973.[2] In the course of those conversations, all of which took place after Higgins and the fabric thieves had been arrested, petitioner discussed the arrests, speculated that someone had "put the finger" on Higgins, and made statements reflecting his involvement in the fabric storage operation and in other schemes involving the storage of stolen property (see, *e.g.*, Tr. 3.63, 3.80-3.86, 3.100, 3.182-3.184).

3. The government's application for authorization to conduct oral interceptions included an affidavit by FBI Agent Douglas L. Hokenstad, who was then in charge of the investigation. The affidavit provided an extensive account of the investigation of petitioner's on-going dealings in stolen goods and set forth reasons to believe that petitioner used his office on a regular basis to discuss the sale of stolen goods (Hokenstad Affidavit, attached to application for April 5, 1973, order).

On the basis of the application and the affidavit, the district court entered the April 5 order authoriz-

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[1] The two wire interception orders were entered pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520. The first order authorized wire interceptions for a period of 20 days, and the second order extended the authorization for an additional 20 days (Pet. App. 2a-3a; A. 6a-10a). A third wire interception order was entered on April 27, 1973, extending the authorization for an additional 20 days (A. 11a-15a), but no conversations intercepted under the authority of that order were introduced at trial. All three orders were entered by Judge Frederick B. Lacey, who also presided at petitioner's trial.

[2] The April 5 order that authorized the continuation of the wire interceptions also provided the initial authorization for the interception of oral communications in petitioner's office (A. 8a). This authorization was extended on April 27 (A. 11a-15a), but no conversations intercepted pursuant to that extension order were admitted at trial. Six of the eight conversations overheard by means of the devices placed in petitioner's office and admitted in evidence at trial took place on April 6, the day after the arrests (Tr. 3.63-3.64, 3.78-3.86, 3.98-3.100, 3.101-3.102, 3.103-3.105, 3.175-3.186), one took place on April 9 (Tr. 4.73-4.75), and the last took place on April 17 (Tr. 4.93-4.94).

ing the initiation of interception of oral communications and the continued interception of wire communications (A. 6a-10a). The court found probable cause to believe that petitioner and others were engaged in thefts from interstate shipments, sale or receipt of stolen goods, interference with commerce by threats or violence, and conspiracy (A. 6a). The court further found that there was probable cause to believe that the authorized wire and oral communications would provide evidence concerning these offenses and that normal investigative methods appeared unlikely to succeed and were too dangerous (A. 7a). In particular, the court found that petitioner's office "[was] being used, and is being used by [petitioner] and others as yet unknown in connection with the commission of the above-described offenses" (*ibid.*).

Accordingly, the April 5 order authorized FBI agents to intercept oral communications in petitioner's office, which was specifically identified as the 15- by 18-foot room in the northwest corner of the one-story building that housed his business operation (A. 8a). The order provided that the authorization to intercept both oral and wire communications "shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception * * *" (A. 9a). The order did not otherwise specify the manner of execution, except to provide that the New Jersey Bell Telephone Company should furnish all information, facilities and technical assistance necessary to ac-

complish the wire interception unobtrusively (A. 9a). The order contained no explicit authorization for agents to enter petitioner's place of business to install the listening device necessary to intercept the oral communications.

At about midnight on the night of April 5-6, FBI agents secretly entered petitioner's office for the purpose of installing an electronic listening device (A. 31a-32a). The agents entered the building through an open side window; after determining that the building was empty, they went to petitioner's office, where they installed the listening device in the acoustical tiles in the ceiling directly above petitioner's desk (A. 31a-32a, 36a-39a; Exhibit A, attached to Gov't C.A. Br. at 3, 6, 9). The installation and testing procedure took about two to three hours (A. 39a-40a). The agents seized no evidence while they were in the building (A. 32a).

The listening device functioned without need for adjustment throughout the period for which the oral interceptions were authorized, and between the date of installation and the date of removal the agents made no entries onto the premises (A. 32a, 42a). On May 16, 1973, all electronic surveillance ended. That night, FBI agents re-entered the building through the same window and removed the listening device (A. 36a, 40a-41a).

4. Prior to trial, petitioner moved to suppress the evidence obtained by means of the electronic surveillance. Among the grounds urged for suppression was that the agents lacked authority to make the surreptitious entries into petitioner's office to install and

remove the listening device (Tr. 1.3-1.12). The district court denied the motion without prejudice to renewal at the close of trial (Tr. 1.17).

After trial, the court held an evidentiary hearing on petitioner's motion. Following the hearing, the court denied the motion, finding that the entry into petitioner's business premises was the safest and most successful method of installing the listening device needed to accomplish the interception (Pet. App. 17a). In most cases, the court observed, "the only form of installing such devices is through breaking and entering. The nature of the act is such that entry must be surreptitious and must not arouse suspicion, and the installation must be done without the knowledge of the residents or occupants" (*id.* at 17a-18a). Accordingly, the court held that once a showing of probable cause is made to support the issuance of a court order authorizing the interception of oral communications, "thereby sanctioning the serious intrusion caused by interception, implicit in the court's order is concomitant authorization for agents to covertly enter the premises in question and install the necessary equipment" (*id.* at 18a).

5. The court of appeals affirmed (Pet. App. 1a-8a). It accepted Judge Lacey's finding that surreptitious entry was the most effective means for installing the listening device as well as his findings that the installation was based on probable cause and was executed in a reasonable fashion (*id.* at 7a). In these circumstances, the court held, neither Title III nor the Fourth Amendment required express authori-

zation for the entry beyond that provided by the authorization for the interception itself. The court noted, however, that it was not adopting a rule that specific authorization for a surreptitious entry would never be required and stated that in the future it would be preferable for government agents to include a statement regarding the need for such an entry when a break-in is contemplated (*ibid.*). But on the facts of this case, the court held that the agents' failure to include a specific entry provision in their request for authorization to conduct an interception of oral communications did not result in a constitutional or statutory violation and did not require suppression of the intercepted conversations.

SUMMARY OF ARGUMENT

The intercepted oral communications that were introduced at trial in this case were seized pursuant to a surveillance order entered by the district court under the authority of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The order specified the location at which the interceptions were to take place, the persons whose conversations were to be intercepted, and the offenses for which the investigation was being conducted. The order did not, however, specify the mode by which the FBI agents conducting the investigation should install the listening device necessary to execute the surveillance order. Petitioner challenges the admission of the recordings of oral communications in his office on three grounds: first, that the Constitution does not em-

power courts to authorize law enforcement officers to make surreptitious entries to install electronic surveillance equipment under any circumstances; second, that courts have no statutory authority to permit officers to make such entries; and third, that because the surveillance order did not contain express authorization for a surreptitious entry, the entry in this case—and the resulting interceptions of petitioner's conversations—violated the Fourth Amendment.

1. The Fourth Amendment contains no absolute prohibition against surreptitious entries. A forcible entry onto private property is plainly permissible in executing a search warrant; a court-authorized search does not depend on the acquiescence of the owner or occupant of the property to be searched. Thus, petitioner's broadside constitutional attack on surreptitious entries made to execute a surveillance order must be an objection to the surreptitious nature of the entry, that is, to the lack of prior or contemporaneous notice to the owner or occupant of the premises. But prior notice of entry is not constitutionally required in the context of electronic surveillance. To give notice of entry to install electronic eavesdropping equipment would plainly destroy the purpose of the search: to obtain incriminating conversations without the speaker's awareness that they are being recorded. This Court has clearly indicated that electronic eavesdropping is not unconstitutional if properly authorized by a court, and Title III provides a constitutionally permissible scheme of court authorization for that form of investigation. Thus,

even if the Constitution imposes a requirement that police give notice before entering a home to execute a conventional search warrant, that constitutional principle has no application to entries made to execute a court's surveillance order, particularly when the building entered is not a private home, but an unoccupied business office.

2. The statutory authority for the entry to install electronic eavesdropping equipment is furnished by Rule 41 of the Federal Rules of Criminal Procedure. That rule provides for the seizure of property of various kinds, and it implicitly authorizes law enforcement agents to enter private premises where necessary to search for and seize such property. Nothing in Title III suggests that Congress intended to restrict the authority granted under Rule 41 to enter private premises to execute a court order. In fact, the legislative history of Title III plainly indicates that Congress was aware that surreptitious entries onto private premises would be necessary to conduct electronic eavesdropping in many cases. Accordingly, the general statutory authority to enter private premises granted by Rule 41 applies in the case of entries to conduct electronic surveillance as well as in the case of more conventional searches.

3. Although the surveillance order in this case did not contain any express authorization for the surreptitious entry, no such authorization is required either by Title III or by the Fourth Amendment. While Title III contains detailed requirements respecting what must be shown to obtain a surveillance

order, it is silent regarding the mode of entry to execute an order issued under its provisions. Thus Title III nowhere, expressly or by implication, requires that a court authorizing electronic surveillance specifically describe the means by which the surveillance will be carried out, including an authorization of surreptitious entries if that is necessary.

The Fourth Amendment also does not require express prior authorization of the method used to execute the surveillance order. The protections of the Fourth Amendment against unreasonable searches and seizures apply, of course, to the methods used by law enforcement agents to carry out court-authorized electronic surveillance. But in this case there is no doubt that the use of a covert entry to install the listening device was a constitutionally reasonable procedure. Both courts below found that it was the only feasible means of executing the eavesdropping order, and petitioner does not challenge those findings.

Since the action of the agents was reasonable, petitioner can prevail only if the Fourth Amendment bars all entries, no matter how necessary or reasonable, in the absence of express advance judicial authorization. We contend that a court issuing a warrant need not specify the manner in which a search is to be conducted. Instead, the lawfulness of the means used to execute a warrant should be determined by a subsequent evaluation of the reasonableness of the agents' actions. In circumstances such as those of this case, where the need for a surreptitious entry was evident at the time the court considered

the application and authorized the eavesdropping, we submit that the issuance of the order constituted implicit authorization of the covert entry necessary to carry it out.

Our analysis is supported by examination of the rules governing conventional searches. Under the Fourth Amendment's Warrant Clause, warrants authorizing such searches must particularly describe the place to be searched and the things to be seized. But neither the text of the Amendment nor traditional practice requires any separate, express authorization of the particular means to be used to execute the warrant, including any forcible entry into private premises that may be required. Rather, the authorization to make an entry is implicit in the authorization to conduct the search. The manner of entry is subject to constitutional inquiry for reasonableness, but that inquiry focuses upon the particular means employed, not upon the content of the warrant.

Of course, the warrant procedure can be used to provide advance protection against unreasonable methods of executing a search if the court or magistrate so chooses. The judicial officer has the power to inquire into the means to be employed to carry out the search and to impose such restrictions thereon as he deems appropriate. In the present case, where it was evident from the application that a covert entry was likely to be essential to install the listening device, no such restrictions were deemed necessary, and none was imposed.

We acknowledge that it is ordinarily preferable for the agents to seek and the court to give express authorization for any covert entry necessary to execute an electronic surveillance order. The Department of Justice has modified its procedures so that express authorization is now sought whenever a covert entry will be necessary. But the procedure employed in this case violated neither statutory nor constitutional requirements, and there is accordingly no occasion to suppress the conversations intercepted and used in evidence at petitioner's trial.

ARGUMENT

I

THE FOURTH AMENDMENT DOES NOT PROHIBIT COURT-AUTHORIZED SURREPTITIOUS ENTRIES TO INSTALL ELECTRONIC EAVESDROPPING DEVICES

Petitioner argues (Br. 19-24) that the Fourth Amendment prohibits law enforcement agents from making surreptitious entries onto private property to install eavesdropping devices, even if the entries are made pursuant to court authorization. This contention has been rejected by every court of appeals that has ruled on it,[3] and it is inconsistent with this

[3] In addition to the court of appeals in this case, the courts of appeals for the Second, Fourth, and Eighth Circuits have held that the Constitution does not impose an absolute ban on surreptitious entries to install eavesdropping devices. See *United States* v. *Scafidi*, 564 F.2d 633, 640, 642 (2d Cir. 1977), cert. denied, 436 U.S. 903 (1978); *Application of*

Court's analysis of the application of the Fourth Amendment to electronic surveillance.

It is indisputable that law enforcement agents may break and enter private property to execute a search warrant. Accordingly, petitioner's attack cannot be on the entry itself, but must be that the Fourth Amendment absolutely bars entries conducted in a surreptitious manner, *i.e.*, without contemporaneous notice to the individual whose premises are entered. Yet in the context of electronic surveillance, prior or contemporaneous notice would plainly destroy the viability of the search. Since court-authorized electronic eavesdropping is constitutionally permissible, the Fourth Amendment's command of reasonableness does not prohibit surreptitious entries onto private property when such entries are necessary to install

United States, 563 F.2d 637, 643-644 (4th Cir. 1977); *United States* v. *Agrusa*, 541 F.2d 690, 696-698 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977). Three other courts of appeals have declined to decide whether surreptitious entries to install eavesdropping devices are absolutely prohibited by the Fourth Amendment itself. See *United States* v. *Santora*, 583 F.2d 453, 463 (9th Cir. 1978); *United States* v. *Finazzo*, 583 F.2d 837, 850 (6th Cir. 1978); *United States* v. *Ford*, 553 F.2d 146, 170 (D.C. Cir. 1977). But see *United States* v. *Barker*, 546 F.2d 940, 953 n.40 (D.C. Cir. 1976) (opinion of Wilkey, J.) ("if a trespass is not necessary in a particular case to effect an eavesdrop, the court need not gratuitously authorize a surreptitious entry; but few would question a court's power to do so in those cases in which it is required"). In a brief dissent from the denial of en banc review in *United States* v. *Agrusa*, *supra*, four judges of the Eighth Circuit stated that they "entertain great doubt of the validity of a judicial order which authorizes" surreptitious entries to install eavesdropping devices. 541 F.2d at 704.

the listening devices needed to execute a court's eavesdropping order.

Moreover, any constitutional requirement of notice (a subject nowhere mentioned in the text of the Fourth Amendment) is satisfied in this case by the post-seizure notice afforded under Title III. The contention that the Constitution absolutely prohibits deferral of notice of a search or entry, even when such deferral is indispensable to the successful execution of the search, cannot withstand analysis.

A. Electronic Eavesdropping is Constitutionally Permissible

Prior to the decision in *Katz* v. *United States*, 389 U.S. 347 (1967), this Court had held that eavesdropping would be deemed a "search" for Fourth Amendment purposes only if it involved an unlawful trespass. *Silverman* v. *United States*, 365 U.S. 505 (1961); *On Lee* v. *United States*, 343 U.S. 747 (1952); *Goldman* v. *United States*, 316 U.S. 129 (1942); *Olmstead* v. *United States*, 277 U.S. 438 (1928). In each of these cases, the government had used some device to overhear the defendant's conversations, but the Court held the Fourth Amendment inapplicable unless there had been an unauthorized physical intrusion into private premises to conduct the eavesdropping. In none of these cases did the police obtain a warrant to conduct the eavesdropping.[4]

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[4] In *Silverman* the Court noted that the intrusion was "unauthorized" (365 U.S. at 509), and it observed that the Court had never authorized police intrusions into a home or office

Berger v. *New York*, 388 U.S. 41 (1967), cast serious doubt on the continued decisiveness of the distinction between trespassory and non-trespassory intrusions. The Court in that case held unconstitutional on its face a New York statute that permitted non-consensual wiretapping and eavesdropping, with or without physical intrusions. Although the New York procedure required court authorization for electronic surveillance, the Court held that the procedure nonetheless was inadequate in various respects to meet Fourth Amendment standards.

Finally, in *Katz* v. *United States*, *supra*, the Court rejected the proposition that the Fourth Amendment is inapplicable to searches not involving physical intrusions into private premises. Instead, the Court held that whether electronic surveillance constitutes a "search" depends upon reasonable expectations of privacy with respect to the communications seized rather than whether there has been a physical intrusion into an area in which the defendant has a traditional property interest.

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for the purpose of eavesdropping "without [a] warrant" (*id.* at 512). Similarly, in *Irvine* v. *California*, 347 U.S. 128 (1954), the Court noted that the police entries to install listening devices in the defendant's home were trespassory because they occurred "without a search warrant or other process" (347 U.S. at 132). In *Goldman*, Mr. Justice Murphy dissented on the ground that the eavesdropping in that case constituted a search, but he expressly noted that a warrant could have been devised to permit that kind of intrusion. 316 U.S. at 140 & n.7. See also *On Lee* v. *United States*, *supra*, 343 U.S. at 765-767 (Burton, J., dissenting); *Lopez* v. *United States*, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting).

The agents in *Katz* attached a listening device to the outside of a telephone booth the defendant was using and thereby overheard his portion of several incriminating telephone conversations. Under the Fourth Amendment analysis adopted by the Court in *Katz*, the evidence obtained from the use of the listening device was thus the product of a search. Significantly, however, the Court did not rule that evidence obtained by an eavesdropping "search" is always inadmissible. Instead, it held that the evidence had to be suppressed solely because the law enforcement agents had not obtained court authorization for the eavesdropping. 389 U.S. at 356-357, 359. Citing its decisions in *Osborn* v. *United States*, 385 U.S. 323 (1966), and *Berger* v. *New York*, *supra*, the Court ruled that properly authorized electronic surveillance would be permissible. 389 U.S. at 355-356. Indeed, it specifically stated that the surveillance of Katz's conversations would have been lawful if judicial authorization for the surveillance had been obtained. 389 U.S. at 354.

B. Title III Provides a Scheme for Electronic Eavesdropping that Meets Constitutional Standards

Following this Court's decisions in *Berger* and *Katz*, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. Title III of that Act establishes a detailed scheme for judicial authorization of interceptions of wire and oral communications. The provisions closely track this Court's analysis in *Berger*

in an effort to overcome the various constitutional infirmities that the Court had found in the New York electronic surveillance statute. See *Scott* v. *United States*, 436 U.S. 128, 130 (1978); *United States* v. *United States District Court*, 407 U.S. 297, 302 (1972).

Title III satisfies each of the constitutional objections that the Court had raised with respect to the New York statute. The statute permits interception of wire and oral communications only in limited circumstances and only pursuant to court authorization. See 18 U.S.C. 2511. Authorization may be granted only upon a detailed showing and a finding by the court that there is probable cause to believe that an individual is engaged in one of the offenses for which electronic surveillance is permitted (18 U.S.C. 2518 (3)(a)), that particular communications concerning that offense will be obtained through the interception (18 U.S.C. 2518(3)(b)), and that the wire or location at which the interception is to take place is being used in connection with the commission of the offense (18 U.S.C. 2518(3)(d)).[5] The statute also requires that the interception order identify with particularity the persons, if known, whose communications are to be intercepted (18 U.S.C. 2518(4)(a)), describe the facilities or place as to which the authority to intercept is being granted (18 U.S.C. 2518(4)(b)), and specify the type of communication

[5] These stringent probable cause requirements meet the Court's concern that the New York statute's "reasonable cause" standard was too lax. See 388 U.S. at 54-55.

being sought and the offense to which it relates (18 U.S.C. 2518(4)(c)).[6]

The statute further requires that the officers execute the order quickly, maintain the interception for only a limited period of time, and make a timely return on the eavesdropping order showing what was seized. 18 U.S.C. 2518(5), 2518(8)(a).[7] Moreover, the statute requires a showing by the applicant and a finding by the court that other investigative methods have been tried and have failed or reasonably appear to be unlikely to succeed or too dangerous to attempt. 18 U.S.C. 2518(1)(c), 2518(3)(c).[8]

Finally, the statute provides that the persons named in the order shall be served with an inventory within a reasonable time after the interception is authorized, giving notice of the order or application, the disposition of the application, and whether communications were intercepted. 18 U.S.C. 2518(8)(d). See *United States* v. *Donovan*, 429 U.S. 413, 428-432 (1977).[9]

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[6] These provisions are responsive to the Court's objection that the New York procedure contained no requirement that the place to be searched and the things to be seized be particularly described. See 388 U.S. at 56-59.

[7] The New York statute was criticized for its failure to contain any such provisions. 388 U.S. at 59-60.

[8] This provision was designed to respond to the Court's observation that the New York statute permitted "unconsented entry without any showing of exigent circumstances." 388 U.S. at 60.

[9] This provision was addressed to the Court's observation that the New York statute contained no provision for notice to the person whose communications were overheard. 388 U.S. at 60.

In light of the close controls imposed by the statute and its careful attention to the constitutional concerns voiced by the Court in *Berger*, every court of appeals that has ruled on the issue has held that Title III is constitutional. See, *e.g.*, *United States* v. *Turner*, 528 F.2d 143, 158-159 (9th Cir. 1975); *United States* v. *Sklaroff*, 506 F.2d 837, 840 (5th Cir. 1975); *United States* v. *Ramsey*, 503 F.2d 524, 526 (7th Cir. 1974), cert. denied, 420 U.S. 932 (1975); *United States* v. *O'Neill*, 497 F.2d 1020, 1026 (6th Cir. 1974); *United States* v. *James*, 494 F.2d 1007, 1013 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974); *United States* v. *Tortorello*, 480 F.2d 764, 775 (2d Cir.), cert. denied, 414 U.S. 866 (1973); *United States* v. *Bobo*, 477 F.2d 974, 981 (4th Cir. 1973); *United States* v. *Cafero*, 473 F.2d 489, 495-500 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974); *United States* v. *Cox*, 462 F.2d 1293 (8th Cir. 1972); *Cox* v. *United States*, 449 F.2d 679 (10th Cir. 1971).[10]

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[10] This Court has never held that Title III is constitutional on its face, see *United States* v. *Kahn*, 415 U.S. 143, 150 (1974); *United States* v. *United States District Court*, 407 U.S. 297, 308 (1972), but on several occasions it has upheld the admission of evidence obtained under the authority of Title III despite constitutional challenge. See *Scott* v. *United States*, *supra*; *United States* v. *Donovan*, 429 U.S. 413 (1977); *United States* v. *Chavez*, 416 U.S. 562 (1974); *United States* v. *Kahn*, *supra*. Cf. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 463-465 (1977).

C. The Fourth Amendment Permits Surreptitious Entries to Execute Eavesdropping Orders Issued In Compliance with Title III

Although petitioner acknowledges that Title III is "a careful response to the *Berger* and *Katz* holdings" (Br. 22), he contends that the statute fails to satisfy the constitutional objections raised in *Berger* in one critical respect. According to petitioner (Br. 23), Title III improperly permits unconsented entry without notice or a showing of exigency, a point that the Court noted in *Berger* as one of the infirmities of the New York statute. 388 U.S. at 60.

Petitioner's objection to the lack of prior or contemporaneous notice is disposed of by *Katz* v. *United States*, *supra*, and *United States* v. *Donovan*, *supra*. In *Katz*, the Court stated that the reasons for requiring notice prior to an entry or a seizure of evidence have no bearing in the context of electronic surveillance. 389 U.S. at 355 n.16. In the case of judicially authorized electronic surveillance, the court observed, the purposes that generally underlie the requirement of notice—avoiding the shock of unannounced police intrusion into the home and minimizing the danger to the police of an unannounced entry—do not apply. *Ibid.* The Court made the same point in *Donovan*, this time with express reference to Title III. Citing the portion of *Berger* on which petitioner relies and the portion of *Katz* referred to above, the Court held that the notice and return provisions in Title III, 18 U.S.C. 2518(8)(a), "satisfy constitutional requirements." *United States* v.

Donovan, *supra*, 429 U.S. at 429 n.19. The statute ensures that notice of the interceptions will be provided; it simply postpones the notice until after the interception.

Petitioner's objection that the statute lacks an adequate requirement that exigency be shown is also without merit. Title III expressly requires a showing of exigency before a wire or oral interception may be authorized. See 18 U.S.C. 2518(1)(c), 2518(3)(c). Prior to approving any electronic surveillance, the court must find that other investigative methods have been tried and have failed or are impracticable. These statutory provisions have uniformly been held to satisfy the objection in *Berger* that the New York statute permitted "unconsented entry without any showing of exigent circumstances" (388 U.S. at 60). See, *e.g.*, *United States* v. *Sklaroff*, *supra*, 506 F.2d at 840; *United States* v. *Bobo*, *supra*, 477 F.2d at 982; *United States* v. *Cafero*, *supra*, 473 F.2d at 498-501.

The broader contention that the Fourth Amendment does not permit entries onto private property to install eavesdropping devices under any circumstances is inconsistent with the Court's analysis in *Katz*, *Osborn*, and *Berger*, and with well-settled principles governing the execution of search warrants generally. Although the surveillance in *Katz* and *Osborn* did not involve physical trespasses, the rationale of those cases suggests that there should be no distinction for Fourth Amendment purposes between an intrusion by electronic surveillance from outside the physical

premises in question and electronic surveillance that involves an unconsented entry. The Court implicitly recognized this point in *Alderman* v. *United States*, 394 U.S. 165 (1969), when it observed that under the principles of *Silverman* and *Katz*, officers cannot enter a house to install a listening device if the intrusion is not made pursuant to a valid warrant. See also T. Taylor, *Two Studies in Constitutional Interpretation* 114 (1969).

Moreover, *Berger* itself involved a surreptitious entry to install an eavesdropping device, and the Court's opinion nowhere suggested that the intrusion to install the device was *per se* unreasonable. Instead, the Court held only that the New York warrant procedure was too broad to permit "a trespassory intrusion into a constitutionally protected area" (388 U.S. at 44). The Court was careful to point out that eavesdropping can be constitutionally permissible "under specific conditions and circumstances" (388 U.S. at 63). The Fourth Amendment, the Court observed, does not make the home or the office sanctuaries where the law can never reach, "but it does prescribe a constitutional standard that must be met before official invasion is permissible" (388 U.S. at 64).[11]

[11] Three members of the Court in *Berger* would have upheld the court-authorized intrusion and interception in that case. See 388 U.S. at 81 (Black, J., dissenting); *id.* at 94 (Harlan, J., dissenting); *id.* at 112 (White, J., dissenting). Mr. Justice Stewart, who concurred on a narrow ground, would not have struck down the New York statute, but, like the three dissenters, would have held that electronic eavesdropping under the authority of the New York statute would be constitutional

The law governing the execution of conventional search warrants is in accordance with this analysis. The courts have uniformly held that entries into unoccupied premises to undertake otherwise permissible searches are constitutional. *United States* v. *Brown*, 556 F.2d 304, 305 (5th Cir. 1977); *United States* v. *Agrusa*, *supra*, 541 F.2d at 698; *Payne* v. *United States*, 508 F.2d 1391, 1393-1394 (5th Cir.), cert. denied, 423 U.S. 933 (1975); *United States* v. *Gervato*, 474 F.2d 40 (3d Cir.), cert. denied, 414 U.S. 846 (1973).[12]

Although this Court has never expressly held that entries into unoccupied premises are constitutional, the Court's Fourth Amendment decisions are consistent with this principle. On numerous occasions when the Court has held that a warrant was required in order to make a valid search, the premises in question were vacant or the property unattended, either because of the arrest of the defendant

if an adequate showing of probable cause were made. *Id.* at 68 (Stewart, J. concurring in the result). Only Mr. Justice Douglas would have held electronic eavesdropping impermissible in all cases. *Id.* at 67 (Douglas, J., concurring).

[12] The rule in the state courts is the same. See, *e.g.*, *State* v. *Gutierrez*, 91 N.M. 542, 577 P.2d 440, 447-448 (1978); *Hart* v. *Superior Court*, 21 Cal. App. 3d 496, 502-504, 98 Cal. Rptr. 565, 569-571 (1971); *State* v. *Calvert*, 219 Tenn. 534, 410 S.W.2d 907 (1966); *State* v. *Williams*, 250 La. 64, 193 So. 2d 787 (1967); *Outlaw* v. *State*, 208 Miss. 13, 43 So. 2d 661 (1949); *State* v. *Robinson*, 354 Mo. 74, 188 S.W. 2d 664 (1945); *Thigpen* v. *State*, 51 Okla. Crim. 28, 299 P. 230 (1931); *People* v. *Law*, 55 Misc. 2d 1075 287 N.Y.S. 2d 565 (1968); *People* v. *Johnson*, 231 N.Y.S. 2d 689 (Sup. Ct. 1962); *State* v. *Dropolski*, 100 Vt. 259, 136 A. 835 (1927).

or for some other reason.[13] See, *e.g.*, *Mincey* v. *Arizona*, No. 77-5353 (June 21, 1978); *Michigan* v. *Tyler*, 436 U.S. 499 (1978); *Chapman* v. *United States*, 365 U.S. 610, 615 (1961); *Agnello* v. *United States*, 269 U.S. 20, 32-33 (1925). While some reference to the subject could be expected if petitioner's proposition were correct, these decisions contain no suggestion, explicit or implicit, that the target of the search or someone acting on the target's behalf would have to be present or have prior notice for the search to be constitutional.

Finally, even the common law rule governing entries to execute search warrants does not support petitioner's position. At common law, government officers executing a search warrant could not break into a private dwelling, absent exigent circumstances, without first announcing their identity and purpose. See *Miller* v. *United States*, 357 U.S. 301 (1958); Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 501-504 (1964). That rule has been codified in 18 U.S.C. 3109 and has been characterized as having constitutional overtones. See *Sabbath* v. *United States*, 391 U.S. 585, 591 n.8 (1968); *Ker* v. *California*, 374 U.S. 23, 49, 53 (opinion of Brennan,

[13] The Federal Rules of Criminal Procedure plainly contemplate that some valid warrant searches will take place when the premises searched are unoccupied. Rule 41(d) provides that a copy of the warrant and a receipt shall be given to the person from whose premises the property was taken "or [left] at the place from which the property was taken." Similarly, the inventory must be made in the presence of the persons from whose premises the property was taken "if they are present."

J.). The common law requirement of prior notice, however, does not aid petitioner here for several reasons. First, because forms of electronic surveillance were then unknown, the common law rule was designed solely with reference to conventional searches for tangible property already in existence. The costs to law enforcement of a rule of prior notice were properly perceived as minimal in that context. In the case of electronic surveillance, by contrast, prior notice would invariably destroy the purpose of the search. Thus, it is difficult to credit the view that the common law judges would have applied the requirement of prior notice if they had been faced with the problem of court-authorized electronic surveillance. Moreover, both the common law rule and 18 U.S.C. 3109 apply only to private dwellings.[14] Ac-

[14] At common law, no announcement was ever required prior to searching a building other than a home. See *Penton* v. *Brown*, 1 Keble 699, 83 Eng. Rep. 1193 (K.B. 1664); *Androscoggin R.R.* v. *Richards*, 41 Me. 233, 238 (1856); Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, *supra*, 112 U. Pa. L. Rev. at 501-504. Section 3109 is similarly limited to entries into dwellings and has no application to entries into other private property. See *United States* v. *Agrusa*, *supra*, 541 F.2d at 697, 699-700 & nn.21, 22 (collecting cases); *Fields* v. *United States*, 355 F.2d 543 (5th Cir.), cert. dismissed, 384 U.S. 935 (1966).

The courts have recognized an "exigent circumstances" exception to Section 3109. See, *e.g.*, *United States* v. *Carter*, 566 F.2d 1265, 1268 (5th Cir.), cert. denied, No. 78-1326 (1978); *United States* v. *Murrie*, 534 F.2d 695, 698 n.1 (6th Cir. 1976); *United States* v. *Smith*, 520 F.2d 74, 76-81 (D.C. Cir. 1975); *United States* v. *Bustamonte-Gomez*, 488 F.2d 4, 11 (9th Cir. 1973), cert. denied, 416 U.S. 970 (1974). See also *Sabbath* v. *United States*, *supra*, 391 U.S. at 591 n.8.

cordingly, neither the common law nor any statutory or constitutional rule of prior notice applies to the entry of this case into an unoccupied office building, in circumstances in which the giving of notice would have been fatal to the ability to execute the search.

II

DISTRICT COURTS HAVE STATUTORY POWER TO AUTHORIZE SURREPTITIOUS ENTRIES FOR THE PURPOSE OF INSTALLING ELECTRONIC EAVESDROPPING DEVICES

Petitioner contends (Br. 9-19) that, constitutional barriers aside, the district court lacked statutory authority to permit law enforcement officers to enter his office surreptitiously for the purpose of installing the electronic equipment necessary to achieve the judicially authorized interception of his oral communications. He bases this conclusion solely upon the absence of any express mention in Title III of covert entries to plant a "bug," urging that this silence on "an issue with such enormous public interest and political consequences" is "powerful evidence" (*id.* at 18) that Congress could not have intended to allow such entries.

It is not surprising, however, that Title III does not dwell on this subject. In the wake of this Court's decisions in *Berger* and *Katz*, which had restricted the availability of electronic surveillance as a law enforcement technique but had suggested that it would be possible to construct a statutory system that would satisfy the Fourth Amendment, Congress's overriding concern was the expeditious enactment

of legislation that would authorize the search and seizure, consistent with constitutional requirements, of a person's spoken words. See *United States* v. *United States District Court*, *supra*, 407 U.S. at 310 n.9. Hence, as the Court recently observed in *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 (1977) (emphasis added), "Title III is concerned *only* with orders 'authorizing or approving the interception of a wire or oral communication * * *,'" not with other, collateral types of intrusions (such as the unconsented entry onto private premises) that the Court had not condemned in *Berger* and *Katz* and that were adequately covered by other statutory provisions.

Rule 41(b) of the Federal Rules of Criminal Procedure empowers a district court to authorize law enforcement officers to enter private premises for the purpose of conducting a search and seizure. The rule applies, without qualification, to the search and seizure of both tangible and intangible objects (*United States* v. *New York Telephone Co.*, *supra*, 434 U.S. at 169), and petitioner has offered no reason why it would not similarly allow the issuance of a warrant authorizing an entry for the purpose of planting an electronic listening device.[15] See, *e.g.*,

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[15] Two courts of appeals have concluded that a district court is without statutory power to authorize an entry onto private premises in order to install an electronic eavesdropping device. However, the Sixth Circuit in *United States* v. *Finazzo*, *supra*, did not consider the applicability of Rule 41 (but see 583 F.2d at 582 (Celebreeze, J., concurring) ("federal district courts gain sufficient ancillary power from Rule 41 and the All Writs Act to order surreptitious entry to implement such in-

Silverman v. *United States*, *supra*, 365 U.S. at 512; *id.* at 513 (Douglas, J., concurring) (conviction based on trespassory electronic eavesdropping evidence must be reversed "since no search warrant was obtained as required by the Fourth Amendment and Rule 41 * * *."). Moreover, 18 U.S.C. 3109 provides that a law enforcement officer "may break open any outer or inner door or window of a house * * * to execute a search warrant" issued pursuant to lawful authority.[16]

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terceptions wholly apart from the power to authorize such entry which exists in Title III itself")), while the Ninth Circuit in *United States* v. *Santora*, *supra*, found Rule 41 irrelevant only because "the rule does not apply to the issuance of intercept orders" (583 F.2d at 464 n.10). This objection is beside the point. Of course Rule 41 was not designed to empower a court to authorize electronic surveillance; Congress enacted the detailed provisions of Title III for precisely that purpose. The fact that Rule 41 does not itself authorize eavesdropping is no answer to the contention that the rule permits a court to authorize a search, such as the entry to install a listening device, that does not itself constitute an interception of communications. Such entries are indistinguishable from the entries onto private property, concededly within the scope of Rule 41, that regularly precede the search for and seizure of books, contraband, or other tangible evidence of criminal activity.

[16] Although Section 3109 requires the police officer to give "notice of his authority and purpose," the Court has recognized, in the context of electronic surveillance, "that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence." *Katz* v. *United States*, *supra*, 389 U.S. at 355 n.16. See *Berger* v. *New York*, *supra*, 388 U.S. at 60; *Osborn* v. *United States*, *supra*, 385 U.S. at 328-330; *Ker* v. *California*, *supra*, 374 U.S. at 37-41; *United States* v. *Agrusa*, *supra*, 541

There is not the slightest hint in either the detailed statutory language or the extensive legislative history of Title III that Congress intended to abrogate this established grant of authority. To begin with, although Congress had no need to address the question of surreptitious entries in Title III, it unquestionably was aware during its consideration of the statute that, while the interception of wire communications was typically accomplished by means of an outside connection with a telephone line (see *Berger* v. *New York*, *supra*, 388 U.S. at 46), electronic eavesdropping traditionally required the secret placement of a listening device in the area where the conversations were expected to occur.

Congress was informed by both advocates and opponents of electronic surveillance legislation dealing with "bugging" that covert entries were often necessary in the course of installation. For example, Professor Blakey, who favored the enactment of legislation authorizing electronic eavesdropping and was the principal draftsman of Title III, cautioned that "[i]t is often difficult if not impossible to install [eavesdropping devices] safely where a surreptitious entry is required. * * * Like a thief in the night, the officer must secretly enter to install the bug." Blakey, *Aspects of the Evidence Gathering Process in Or-*

F.2d at 699-701. See also 114 Cong. Rec. 13208 (1968); McNamara, *The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?*, 15 Am. Crim. L. Rev. 1, 31 n.97 (1977); Note, *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 63, 194 (1968).

ganized Crime Cases, reprinted in the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime*, App. C at 92, 97 (1967). Other persons recommended that, in light of these problems, the proposed legislation be limited to types of electronic surveillance that would not require a trespass. See, *e.g.*, *Anti-Crime Program: Hearings on H.R. 5037, etc. Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 937 (1967). The congressional hearings contain repeated references by knowledgeable witnesses to the necessity for secret entries onto private premises in connection with electronic eavesdropping. See, *e.g.*, *Hearings on Invasions of Privacy Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 973, 997-998, 1007, 1011-1012, 1225-1226, 1249-1250, 1252, 1517-1518, 1702, 1704-1705, 1731-1732, 1954, 2339-2340, 2379-2380 (1966).

Perhaps more important, this Court's decisions involving the interception of oral communications, which were studied closely by Congress and cited time and again during the legislative hearings and floor debates and in the committee reports, had alluded on a number of occasions to the need for covert entries. See *Silverman* v. *United States*, *supra*, 365 U.S. at 510; *Lopez* v. *United States*, *supra*, 373 U.S. at 467 n.15 (1963) (Brennan, J., dissenting); *Irvine* v. *California*, *supra*, 347 U.S. at 130-132. Indeed, as we noted earlier, the electronic eavesdropping provisions of Title III were drafted in direct response to the

decision in *Berger* v. *New York*, *supra*, which had involved a surreptitious entry onto business premises for the purpose of installing a listening device. 388 U.S. at 44, 45; *id.* at 64-65, 67 (Douglas, J., concurring). See *United States* v. *United States District Court*, *supra*, 407 U.S. at 302.

The legislative history is also marked by statements by legislators themselves indicating recognition of the need for surreptitious entries. Senator Morse, an opponent of Title III who feared that its eavesdropping provisions would result in the indiscriminate invasion of individual privacy, remarked (114 Cong. Rec. 11598 (1968)):

> I know that elaborate efforts are made to distinguish between a real wiretap, or bug, which requires someone to intrude upon private premises to install. That kind of invasion is truly a search, requiring a warrant under conditions set forth in article 4. But electronic surveillance, whereby conversations can be picked up from scores of feet away, without any physical intrusion upon the premises involved, is a far more insidious invasion of privacy, and one which I do not believe should be tolerated at all.

Senator Tydings, a supporter of the bill, responded by contending that there was no reason to fear that traditional investigative techniques would be wholly dispensed with in favor of electronic surveillance, partly because (114 Cong. Rec. 12989 (1968)):

> [Electronic] surveillance is very difficult to use. Tape [*sic*] must be installed on telephones, and wires strung. Bugs are difficult to install in

> many places since surreptitious entry is often impossible. Often, more than one entry is necessary to adjust equipment.

See also 114 Cong. Rec. 14709-14710, 14732-14734 (1968); S. Rep. No. 1097, 90th Cong., 2d Sess. 67-68, 102-103 (1968); *Anti-Crime Program: Hearings on H.R. 5037, etc. Before the Subcomm. No. 5 of the House Comm. on the Judiciary, supra*, at 1031.

Senator Tydings also referred during the debates to testimony before a Senate subcommittee concerning highly incriminating oral communications that had been intercepted by the FBI through use of a bugging device placed in the office of an organized crime figure. See *Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, etc. Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 937-954, 998 (1967). The device had been installed by trespassory means but without a warrant, and the evidence obtained was therefore inadmissible in court. See *id.* at 970-971. Senator Tydings assured his colleagues that electronic eavesdropping accomplished in this manner but in compliance with the provisions of Title III requiring advance judicial authorization would have produced a different result (114 Cong. Rec. 12986 (1968)):

> Under the bill [now] before us, with a proper showing of probable cause and close judicial supervision, this surveillance could have been used to indict and convict [the target of the surveillance]. That he cannot be held responsible for all his criminal activities, with all that we know, is incredible.

Despite this clear congressional awareness of the necessity for covert entries in order to carry out judicially authorized eavesdropping approved by the statute, nothing in Title III suggests that such techniques henceforth were to be prohibited. The most logical conclusion to be drawn from Congress' failure to address the matter in the statute is that it assumed that the normal methods of effectuating electronic surveillance of oral communications were already authorized and would continue.[17] It bears repeating that Title III was a response to court decisions that had declared unconstitutional the procedures followed in employing several investigative tools that had proven quite valuable to law enforcement efforts, especially against organized crime. "The major purpose of title III," as the Senate Report explained, "is to combat organized crime" (S. Rep. No. 1097, *supra*, at 70), and accordingly Congress had little incentive to circumscribe those efforts more narrowly than was constitutionally necessary. See

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[17] In its comment on the statutory definition of "oral communication," for example, the Senate Report cited *Silverman* and *Berger* and noted that Title III was intended merely to reflect existing law. S. Rep. No. 1097, *supra*, at 89-90. Although the American Bar Association also has recognized that surreptitious entry must accompany the installation of most bugging devices (ABA Standards for Criminal Justice, *Electronic Surveillance*, General Commentary, at 45, 65 n. 175, 91-92; Commentary on Specific Standards, at 139-140, 149; Appendix D, at 209 (Approved Draft 1971)), it too has not adopted a specific surreptitious entry provision in either the Tentative Draft of 1968 or the Approved Draft of 1971. Compare §§ 5.7-5.8, at 8 in the Standards of the Tentative Draft with §§ 5.7-5.8, at 18-19 of the Proposed Final Draft of Standards.

United States v. *Kahn*, *supra*, 415 U.S. at 151. Instead, the statute was viewed as "[l]egislation meeting the constitutional standards set out in the [*Berger* and *Katz*] decisions, and granting law enforcement officers the authority to tap telephone wires and install electronic surveillance devices in the investigation of major crimes and upon obtaining a court order" (S. Rep. No. 1097, *supra*, at 75).

Indeed, contrary to petitioner's assertion (Br. 17) that Title III is utterly silent on the matter, there are a number of indications in the statute that Congress expected that law enforcement officers would have to engage in surreptitious entries. First, Title III is specifically directed to the interception of both "wire" and "oral" communications (18 U.S.C. 2518 (1)), and there can be no serious dispute that the latter type of interception frequently entails the placement of a "bug."[18] Second, Congress broadly

[18] Title III is the product of two bills. The first (S. 675, 90th Cong., 1st Sess. (1967)) was introduced by Senator McClellan in January 1967, five months prior to the Court's decision in *Berger*. See S. Rep. No. 1097, *supra*, at 225. That bill proposed to prohibit wiretapping by persons other than duly authorized law enforcement officers acting pursuant to court order but did not attempt to legislate with respect to electronic eavesdropping. At the time the McClellan bill was introduced, federal law proscribed all private and governmental wiretapping. By contrast, "bugging" was constitutionally and statutorily permissible so long as it did not entail a warrantless physical trespass onto private property.

S. 675 would have left the pre-*Berger* law on "bugging" unchanged. Two weeks after the decision in *Berger*, however, Senator Hruska, who had co-sponsored S. 675, introduced a second bill, S. 2050, 90th Cong., 1st Sess. (1967) (see 113 Cong. Rec. 18007 (1967)), which was "tailored to meet the constitutional requirements imposed by that decision." S. Rep. No. 1097, *supra*, at 224. This second bill, which applied to electronic eavesdrops as well as to wiretaps (see 114 Cong. Rec. 13209 (1968)), was eventually enacted, with modifications following the decision in *Katz*, as Title III. See *United States* v. *Donovan*, *supra*, 429 U.S. at 426. Senator Hruska's statements during the legislative hearings leave no doubt that S. 2050 was intended to authorize the interception of oral communications, subject to the Fourth Amendment requirements outlined in *Berger*. See *Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, etc. Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, *supra*, at 11.

As petitioner notes (Br. 17-18), the Ninth Circuit has gleaned from this history that "[t]here is not the slightest suggestion in Senator Hruska's remarks to indicate any intent on his part to overturn the long-established *Silverman* doctrine that evidence obtained by trespassory bugging was inadmissible as a violation of the Fourth Amendment." *United States* v. *Santora*, *supra*, 583 F.2d at 459. But, as we have discussed above (see pages 20-21 and note 4, *supra*), *Silverman* held only that *warrantless* trespasses to plant a bug were contrary to the Fourth Amendment. It was the absence of a warrant, rather than the surreptitious entry, that offended the Constitution, and Title III was plainly designed to remedy that defect by requiring judicial authorization before law enforcement officers could engage in any form of nonconsensual electronic surveillance. See *Silverman* v. *United States*, *supra*, 365 U.S. at 512 ("a federal officer may [not] *without warrant* and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard") (emphasis added); *United States* v. *Agrusa*, *supra*, 541 F.2d at 696 n.12.

defined "electronic, mechanical, or other [surveillance] device" to mean "*any* device or apparatus which can be used to intercept a wire or oral communication" (18 U.S.C. 2510(5); emphasis added), thus plainly including listening devices, such as

"bugs," that in the vast majority of instances require covert installation within enclosed private areas. Third, the statute requires that the interception application and order contain a "full and complete statement * * * including * * * a particular description of the nature and location of the facilities from which *or the place where* the communication is to be intercepted * * *." 18 U.S.C. 2518 (1)(b)(ii) (emphasis added); see also 18 U.S.C. 2518(3)(d), (4)(b). Finally, 18 U.S.C. 2518(4) specifically authorizes a court, upon request of a law enforcement officer, to direct private citizens, including a "*landlord*, custodian or other person," to "furnish [the officer] all information, facilities, and technical assistance necessary to *accomplish the interception unobtrusively*" (emphasis added).[19] These provisions, as the Fourth Circuit has observed, "at least inferentially, support[] the * * * position that Congress intended to approve covert entry as a permissible concomitant of judicially-sanctioned eavesdropping." *Application of United States, supra*, 563 F.2d

[19] See *Electronic Surveillance, supra*, at 81. The language of Section 2518(4), as Judge Celebrezze observed in *United States* v. *Finazzo, supra*, 583 F.2d at 851, "apparently authorizes furtive placement of listening devices by gaining access to telephone lines, by using an apartment master key, or by other similar ploys. It is anomalous to hold that the statute does not authorize the entry involved in this case (through an unlocked window) when it plainly authorizes such an entry when facilitated by a landlord or custodian." Acceptance of petitioner's argument, he noted, "could make the result in a given case turn on the fortuity of whether one is an owner of his premises or a tenant or whether one employs custodians or not" (*ibid.*).

at 642. Accord, *United States* v. *Scafidi, supra*, 564 F.2d at 639; *United States* v. *Ford*, 414 F. Supp. 879, 883 (D. D.C.), aff'd, 553 F.2d 146 (D.C. Cir. 1977); *United States* v. *Volpe*, 430 F. Supp. 931, 932-934 (D. Conn. 1977), aff'd, No. 77-1311 (2d Cir. Aug. 7, 1978), petition for a writ of certiorari pending, No. 78-385.

In sum, given the documented history of Title III "replete with references to the evils of organized crime and the pressing need to apprehend its perpetrators through the interception of their communications" (*Application of United States, supra*, 563 F.2d at 642), the strong evidence that Congress was well aware that the interception of oral communications is often accomplished by means of a "bugging" device surreptitiously placed in the target premises, and the unmistakable indications in the statute itself that Congress nonetheless intended to authorize electronic eavesdropping in appropriate circumstances and, when necessary, to require persons such as landlords to assist in the eavesdropping, it would "imput[e] to [Congress] a self-defeating, if not disingenuous purpose" (*Nardone* v. *United States*, 308 U.S. 338, 341 (1939)) to conclude that Title III was meant, without saying so, to forbid law enforcement officers from utilizing a proven, constitutional investigative technique essential to the success of a great many oral interceptions.[20] The

[20] See *United States* v. *New York Telephone Co., supra*, 434 U.S. at 170 ("we could not hold that the District Court lacked any power to authorize the use of pen registers without defying the congressional judgment that the use of pen registers 'be permissible' ").

available evidence surely fails to indicate any "congressional intent to open such a loophole in Title III." *Application of United States, supra,* 563 F.2d at 643.

III

THE ENTRY ONTO PETITIONER'S BUSINESS PREMISES TO INSTALL A LISTENING DEVICE WAS LAWFUL EVEN THOUGH THE DISTRICT COURT DID NOT SEPARATELY AND EXPRESSLY AUTHORIZE THE ENTRY IN ADVANCE

While a telephone wiretap can often be installed from outside the target's premises, installation of an electronic eavesdropping device ordinarily requires a surreptitious entry into the area where the oral communications are to take place. See *Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (Electronic Surveillance)* 43-44 (1976). Partly for this reason, requests for eavesdropping orders are much less common than requests for wiretap orders. In 1977, for example, federal and state agents obtained a total of only 45 eavesdropping orders, while in the same year courts issued a total of 554 wire interception orders. Administrative Office of the United States Courts, *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period January 1, 1977 to December 31, 1977* xiv (1978).[21]

[21] The total number of oral interception orders entered each year has fallen to the present level from a high of 80 in 1973. In that year 731 telephone wiretap authorization orders were entered. See *Electronic Surveillance, supra,* at 269. See also Administrative Office of the United States Courts, *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period January 1, 1976 to December 31, 1976* xvi (1977); Administrative Office of the United States Courts, *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period January 1, 1975 to December 31, 1975* xiv (1976).

We have been informed by the FBI that, when it is feasible, agents employ ruses to obtain access to premises where the courts have authorized oral interceptions in order to install the necessary eavesdropping equipment. A bomb scare ruse, for example, was used in *United States* v. *Ford, supra.* Usually, however, such techniques are not feasible, and a covert entry must be made.[22] See *Electronic Surveillance, supra,* at 15, 43. Moreover, it is almost never possible to conduct electronic eavesdropping without some kind of physical intrusion into the target premises. The "Buck Rogers" type of equipment designed to overhear conversations in a closed room without the necessity of a physical intrusion is simply not reliable enough at present to be of any real

[22] The court of appeals in *Ford* stated that the term "surreptitious entry" encompasses both entries by ruse or stratagem and covert entries (553 F.2d at 154 n.32), and it held that there is no difference between ruse entries and covert entries for Fourth Amendment purposes (*id.* at 155 n.35). While we have reservations about the soundness of this equation of ruse entries with covert entries (cf. *Sabbath* v. *United States, supra,* 391 U.S. at 590 n.7; *Lewis* v. *United States,* 385 U.S. 206 (1966)), the Court need not reach this issue here, since in this case the entry was covert.

use in carrying out oral interception orders. *Electronic Surveillance, supra,* at 44. National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, *Commission Studies, State of the Art of Electronic Surveillance* 171-172, 179-182 (1976).

Petitioner nonetheless contends (Br. at 25-29) that, although the district court authorized the interception of oral communications in his office, his conviction should be overturned because the court did not separately and expressly authorize the entry necessary to install the eavesdropping device. We submit that there is no statutory or constitutional requirement that the entry be separately authorized, so long as the entry is essential to effectuate the authorized interception and is accomplished in a reasonable manner.

Title III itself imposes no requirement that a district court separately approve the entry to install an eavesdropping device. As we have discussed, the legislative history of the statute plainly shows that Congress was aware that on-site electronic surveillance would ordinarily require covert trespassory installation. The 1970 amendments [23] provide further support for this view. They authorize the court to require a landlord or custodian, among others, to

[23] Congress amended Sections 2511(2)(a), 2518(4), and 2520 of Title III as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 654. All three amendments related to the authority of the court to order third parties to cooperate with government agents seeking to execute a surveillance order.

furnish the applicant with facilities and equipment to accomplish the interception "unobtrusively," demonstrating that Congress contemplated that such "unobtrusive" entries would often be necessary. As Judge Gurfein pointed out in his concurring opinion in *United States* v. *Scafidi, supra,* 564 F.2d at 643, this provision is intended for the benefit of the applicant: a "cooperation order" is incorporated in the surveillance order only "upon request of the applicant." Thus, if the agent can obtain the necessary cooperation on his own, or if no such cooperation is necessary to install the listening device, the order authorizing the surveillance need not specially address the mode of installation.

Since the statute does not require a separate authorization for entry, petitioner's claim turns solely on the Fourth Amendment. Under Fourth Amendment analysis, the absence of separate authorization for the entry is not fatal to the surveillance order. The order in this case authorized a search and seizure of particular types of conversations in a specified place; this satisfied the constitutional requirement that a warrant "particularly describ[e] the place to be searched, and the person or things to be seized." The order was issued by a neutral judicial officer upon a sworn statement and after a judicial finding of probable cause that petitioner was engaged in criminal activity, that the activity was being carried out in the place to be searched, and that the conversations to be seized would contain evidence of the criminal activity under investigation. The order thus

satisfied the constitutional requirement that a warrant issue only "upon probable cause, supported by Oath or affirmation." Hence, the order met each of the requirements of the Warrant Clause of the Fourth Amendment. Only if the search was unreasonable and thus in violation of the reasonableness clause of the Amendment would the Constitution be offended and the exclusion of the evidence seized be appropriate.

The Fourth Amendment, of course, protects against unreasonable methods of executing warrants, just as it protects against unreasonable methods of executing otherwise permissible warrantless searches. See *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 559-560 (1978); *Marron* v. *United States*, 275 U.S. 192 (1927); cf. *Ker* v. *California*, *supra*. Accordingly, if there were reasonable methods short of a trespassory entry by which to intercept the oral communications that were the subject of the order, or if the law enforcement agents had used unreasonable means of gaining entry to install the listening device, the constitutionality of the search might properly be questioned. Similarly, if the agents had departed from their task of installing the listening device and had searched for and seized physical evidence inside the building, that evidence would be excludable as the product of an unlawful departure from the course required to execute the warrant. See *Stanley* v. *Georgia*, 394 U.S. 557, 571-572 (1969) (Stewart, J., concurring in the result). But in this case the district court specifically found that "the safest and

most successful method of accomplishing the installation of the [eavesdropping] device was through breaking and entering the premises in question" (Pet. App. 17a). The court of appeals accepted the district court's findings that "a surreptitious entry was the most effective means for installing the interception device" and that "the installation was based upon probable cause and executed in a reasonable fashion" (*id* at 7a). Thus, because the agents conducted the oral interceptions with a proper warrant and because the means of executing the warrant were reasonable, the subsequent seizure of petitioner's conversations was entirely consistent with Fourth Amendment principles.

Although the Second and Third Circuits have agreed with this analysis (Pet. App. 7a-8a; *United States* v. *Scafidi*, *supra*, 564 F.2d at 639-640), the Fourth and District of Columbia Circuits have taken a contrary position. See *Application of United States*, *supra*, 563 F.2d at 644; *United States* v. *Ford*, *supra*, 553 F.2d at 152-165.[24] In the view of the latter courts,

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[24] The Eighth Circuit in *United States* v. *Agrusa*, *supra*, 541 F.2d at 696 n.13, declined to reach the question whether the entry would have to have separate express judicial authorization in order for the intercepted conversations to be admissible in evidence. The surveillance order in that case included an express authorization for surreptitious entry. 541 F.2d at 693. In *United States* v. *Finazzo*, *supra*, the Sixth Circuit held that there was no statutory authority for surreptitious entry and therefore did not reach the question whether the absence of a separate entry authorization would be enough to require suppression of the intercepted communications. In his concurring opinion, however, Judge Celebrezze stated his view that a separate authorization for entry was required.

the entry to install the eavesdropping device and the interception of oral communications implicate two discrete privacy interests and thus require two distinct authorizations. But this analysis is unduly rigid. To require that a court include separate, express authorization for each privacy interest that is affected by a particular governmental intrusion would be inconsistent with the warrant procedure as it is employed in other contexts and would afford little if any meaningful additional protection for individual privacy interests.

The main purpose of a warrant is to "interpose[] a magistrate between the citizen and the police * * * so that an objective mind might weigh the need to invade [the individual's] privacy in order to enforce the law." *McDonald* v. *United States*, 335 U.S. 451, 455 (1948). Accordingly, if the scope of the competing privacy and law enforcement interests is reasonably clear at the time the magistrate issues the warrant, the purpose of the warrant procedure is served. It would be unnecessarily cumbersome to require the magistrate to list and expressly authorize each potential invasion of some privacy interest that could be implicated in the course of executing the warrant.

This analysis accords with the practice followed in the case of conventional warrants authorizing the search for and seizure of physical evidence. Traditionally, the intrusion sanctioned by such warrants has been considered a single invasion of privacy for Fourth Amendment purposes, even though the intrusion implicates both the target's interest in the private uninterrupted enjoyment of the property seized and his interest in the privacy of the premises in which the property is located. As the Court noted in *Boyd* v. *United States*, 116 U.S. 616, 622 (1886), the entry to effect a search and seizure is but "[an] aggravating incident[] of actual search and seizure." Thus, the entry necessary to accomplish a search and seizure ordered by a conventional warrant is not regarded as a separate intrusion requiring separate, explicit judicial authorization. See Fed. R. Crim. P., Appendix of Forms, Form 15. Rather, the warrant's express directive to search a described place for specified items is deemed to carry with it the implicit authority to utilize reasonable means to execute the search, including forcible breaking and entry into the premises, if necessary.

The law governing arrests pursuant to valid arrest warrants provides further support for this analysis. The courts are in agreement that when an officer has a valid arrest warrant and probable cause to believe the subject of the warrant is at home, he may enter the subject's home without the need of a search warrant or other authorization for the entry. See *United States* v. *Cravero*, 545 F.2d 406, 421 (5th Cir. 1976) (on petition for rehearing), cert. denied, 429 U.S. 1100 (1977); *United States* v. *Brown*, 467 F.2d 419, 423 (D.C. Cir. 1972); cf. *Sabbath* v. *United States*, *supra*.[25] The entry into the home invades an

[25] In holding that 18 U.S.C. 3109 applies to the execution of arrest warrants as well as search warrants, the Court in *Sabbath* implicitly approved entries into homes under the

arguably separate Fourth Amendment interest from the interest affected by the arrest itself, but the courts have regarded the arrest warrant as sufficient to override both interests.[26] Thus, if the search or seizure is authorized, the incidental invasion of other Fourth Amendment interests does not require separate authorization, at least where it appears likely at the time of the authorization that the incidental intrusion will be necessary.

Support for this analysis can also be found in the recently enacted Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783. Section 105(b) provides that an order approving electronic surveillance under the Act must specify, among other things, "the means by which the electronic surveillance will be effected and whether physical entry will be used to effect the surveillance." Section 105(b)(1)(D). Significantly, the legislative history of the Act notes that the requirement that the surveil-

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authority of arrest warrants, while holding that notice would ordinarily be required before entering, absent exigent circumstances.

[26] The courts of appeals are split on the question whether an entry can be made into a third party's home to arrest the subject of a warrant, without a separate authorization for the entry. Compare *United States* v. *Cravero, supra; United States* v. *McKinney*, 379 F.2d 259, 262-263 (6th Cir. 1967); and *United States* v. *Brown, supra*, with *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914, 928-930 (3d Cir. 1974). The somewhat different question of the validity of an entry to make an arrest without any kind of warrant is now before the Court in *Payton* v. *New York*, No. 77-5420.

lance order specify the place or facilities against which the surveillance is directed and the type of information sought is "designed to satisfy the Fourth Amendment's requirements that warrants describe with particularity and specificity the person, place, and objects to be searched or seized." S. Rep. No. 95-601, 95th Cong., 2d Sess. 49 (1978). The requirement that the mode of installation be specified, however, was said to be "in addition to the Fourth Amendment's requirements" (*ibid.*). Thus, although the statute included the requirement, not present in Title III, that the mode of entry be specified in the order, that provision was recognized by Congress to be statutory, not constitutional, in scope.

Application of this analysis to the present case leads to the conclusion that separate, express language in the order authorizing entry to install the listening device was not constitutionally required. As we have noted, the legislative history of Title III shows that Congress was well aware that covert entries would ordinarily be required to execute an eavesdropping order. Moreover, as is evident from the description of the premises contained in the eavesdropping application at issue here (see Pet. App. 17a-18a), "a surreptitious entry was within contemplation" (*id.* at 6a) when the order was issued. Accordingly, just as a conventional warrant is deemed to contain implicit authorization to use such means as are reasonably necessary to execute the search and seizure it commands, so the authorization to intercept the conversations in this case must

reasonably be interpreted as providing "concomitant authorization for agents to covertly enter the premises in question and install the necessary equipment" (*id.* at 18a). To hold otherwise is to assume that the authorizing judge engaged in the pointless exercise of ordering the agents to intercept certain conversations at petitioner's place of business while withholding from them the means of carrying out his order.

Our contention that the eavesdropping order in this case implicitly authorized the surreptitious entry necessary to implement it is a limited one. We are not suggesting that it would be constitutionally reasonable or implicitly authorized for agents to use a covert entry technique in any case in which the interception could be accomplished by less intrusive means, nor are we suggesting that re-entries for the purpose of improving the quality of the interceptions would not require specific judicial consideration and authorization. Compare *United States* v. *Ford*, *supra*.[27] We simply contend that in a case like this one, where there has been only a single entry to install the electronic listening device, where that entry was the only feasible means of executing the court's order, and where the conduct of the agents while inside petitioner's premises was limited to installation of the listening device, there is no basis

[27] Unlike the initial entry, re-entries to fix or relocate an existing listening device cannot so readily be viewed as having been within the contemplation of the judge who issued the eavesdropping order.

for refusing to hold that the entry was implicitly authorized by the eavesdropping order and was constitutionally reasonable.

The soundness of the foregoing argument is further bolstered by the fact that the issuing judge, knowing that a surreptitious entry is likely to be required to carry out an eavesdropping order, is free to regulate or restrict the means of installing the equipment as a condition to issuance of the warrant (see *United States* v. *Scafidi*, *supra*, 564 F.2d at 644 (Gurfein, J., concurring)), just as a judge or magistrate issuing a conventional warrant can impose conditions upon the manner of its execution. See *Zucher* v. *Stanford Daily*, *supra*, 436 U.S. at 566; *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). Disobedience to such directives presumably would justify suppression of the evidence seized. But the fact that the court maintains control over the manner of execution of the warrant if it chooses to exercise such control does not mean that it must so choose or that a search is invalid if the court fails explicitly to address the manner of execution, particularly when the likely manner of execution is evident to the court from the face of the application.

Even though we contend that it is not constitutionally required, we recognize that the preferable course is for government agents to include a description of the proposed method of installation in an application for an eavesdropping order and for the court expressly to authorize the entry in the order authorizing the eavesdropping. As several

courts have observed, it imposes no significant additional burden on the government to seek explicit authorization for the surreptitious entry. See *United States* v. *Scafidi*, *supra*, 564 F.2d at 644; Pet. App. 7a. Moreover, because a post-interception finding that the method used to install the listening device was unreasonable may jeopardize a lengthy investigation or an important prosecution, it helps ensure the success of the investigation if the applicant obtains prior judicial approval for the method to be used to install the listening device.

In light of these considerations, the Department of Justice has, since the decision in the *Ford* case, sought express judicial approval in all eavesdropping applications for the entry necessary to install the eavesdropping device. Attorneys supervising the interception of oral communications have also been instructed to seek explicit judicial approval for each subsequent entry required to effectuate the surveillance. The following language is currently included in Departmental authorizations of applications for interception of oral communications:

> The application should include a request that the order providing for the interception specifically authorize surreptitious entry for the purpose of installing and removing any electronic interception devices to be utilized in accomplishing the oral interception. Further, an order should be obtained for each additional entry to replace or maintain any oral interception devices.

Because the interception in this case occurred in 1973, before the Department's policy was instituted, no separate authorization was sought for the entry. Nonetheless, petitioner's conviction should not be upset on this ground. For the reasons we have stated, even though a separate entry authorization may be prudent and may be required in some cases, it was not required in this case by either the statute or the Constitution. Accordingly, neither the statutory suppression remedy (18 U.S.C. 2515, 2518(10)(a)) nor the Fourth Amendment's exclusionary rule requires that the recordings of petitioner's intercepted conversations be suppressed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

WILLIAM C. BRYSON
KENNETH S. GELLER
Assistants to the Solicitor General

JEROME M. FEIT
KATHERINE WINFREE
Attorneys

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